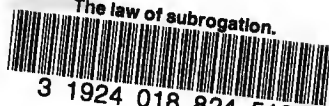


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THE LAW
OF
SUBROGATION.

BY
HENRY N. ^{TON}_{ee} SHELDON.
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P R E F A C E.

It has been my endeavor, in the composition of this book, to state the doctrines which have been laid down by the courts in applying the law of subrogation, without going, beyond the most limited extent, outside of the adjudications of this country and of England. Regarding it as the distinguishing feature of our system of law that it is established by judicial decisions *a posteriori*, and not deduced from *a priori* reasonings, I have made no attempt to go further than the courts have gone; but I have desired to state, as correctly as might be, and with sufficient fulness to be intelligible, the general principles which have been made by the courts, and the important applications which have been made of these principles.

The most logical division which could be made of this subject would be, as it seems to me, to divide it into two heads: first, the subrogation of junior creditors of a common debtor, or of parties holding subordinate interests in the same property, to the rights and remedies of senior creditors, or of persons holding paramount claims upon the property, after they have for the protection of their own interests satisfied these; secondly,

the subrogation of one of several debtors who has, either under compulsion or for the protection of his property, satisfied a common creditor, or a creditor holding a charge upon his property as well as upon that of others, against those debtors by whom, or the owners of that property from which, he ought to have been indemnified, in whole or in part, against the burden which he has thus discharged. The first of these classes would include the subject-matter of my second chapter, on the subrogation of persons holding successive claims upon the same property, most of the cases of the subrogation of devisees and legatees, and probably the subrogation of insurers. Under the second head would be included the subrogation of sureties, of co-sureties, of joint debtors, of parties to bills and notes, and most cases which arise in trust matters. But it has on the whole seemed best to me, for practical convenience, after a general chapter upon the subrogation of different parties having successive claims upon the same property by mortgage, lien, or purchase, to consider separately subrogation in cases of suretyship, among joint debtors, among parties to bills and notes, in the administration of estates, under contracts of insurance, and in favor of strangers. Also for purposes of practical convenience, and because the subjects have often been discussed together by the courts, I have treated somewhat at large under these different heads the substitution of a creditor to the remedies and securities which are held by the surety of his debtor, or by his debtor against one who, by agreement with the debtor, has assumed the burden

of the debt, although I am aware that this is not strictly part of the law of subrogation, being rather the converse of that doctrine.

My subject being a small one, I have endeavored to make a copious citation of authorities, even at the risk of seeming needlessly to multiply references for the support sometimes of undisputed propositions.

HENRY N. SHELDON.

BOSTON, April 11, 1882.

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THE LAW OF SUBROGATION.

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CHAPTER I.

DEFINITION AND GENERAL NATURE.

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§ 1. **Definition of Subrogation.** — Subrogation is a doctrine primarily of equity jurisprudence,¹ although its principles have often, and of late years with increasing frequency, been applied in courts of common law,² especially in those States in which equitable remedies are administered through the forms of law.³ It is the substitution of another person in the place of a creditor,⁴ so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt.⁵ The substitute is put in all respects in the place of the party to whose rights he is subrogated.⁶ It is derived from the civil

¹ Talbot v. Wilkins, 31 Ark. 411; 61; Hall v. Nashville & Chatt. R. R. Springer v. Springer, 43 Penn. St. Co., 13 Wallace, 367; Union Ins. Co. 518; Eaton v. Hasty, 6 Nebraska, v. Burrell, Anth. Cas. (N. Y.) 128; 419; Johnson, Ch., in Gadsden v. Burr v. Beers, 24 N. Y. 178.
Brown, 1 Speers Eq. (So. Car.) 41; ³ See Croft v. Moore, 9 Watts
Hewitt, in re, 25 N. J. Eq. 210; (Peun), 451.
Mosier's Appeal, 56 Penn. St. 76. ⁴ 2 Bouvier's Law Dic., verb. cit.

² See Coles v. Bulman, 6 C. B. 184; Brown v. Hodgson, 4 Taunt. 189; Hart v. Western R. R. Co., 13 Ch. Dec. 253.
Met. 99; Mason v. Sainsbury, 3 Doug.

law, from which it has been adopted by courts of equity.¹ In this country, under the initial guidance of *Chancellor Kent*, its principles have been more widely developed, and its doctrines more generally applied, than in England.² It is treated as the creature of equity,³ and is so administered as to secure real and essential justice without regard to form,⁴ and is independent of any contractual relations between the parties to be affected by it.⁵ It is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter;⁶ but it is not to be applied in favor of one who has, officiously and as a mere volunteer, paid the debt of another, for which neither he nor his property was answerable, and which he was under no obligation to pay;⁷ and it is not allowed where it would work any injustice to the rights of others.⁸

§ 2. **Definition in the Civil Law.**—In the civil law, the definitions of which have in the main been followed by our

¹ *Shinn v. Budd*, 14 N. J. Eq. 234; 221; *Eaton v. Hasty*, 6 Nebraska, Springer v. Springer, 43 Penn. St. 419. 518; *Easterly v. Auburn Bank*, 3 Thomp. & C. (N. Y.) 366; *Furnold v. Missouri Bank*, 44 Mo. 338.

² *Enders v. Brune*, 4 Rand. (Va.) 438, 447; *Douglass v. Fagg*, 8 Leigh (Va.), 588, 598; *Furnold v. Missouri Bank*, 44 Mo. 338.

³ *Clowes v. Dickinson*, 5 Johns. Ch. (N. Y.) 235; *S. C.* 9 Cow. (N. Y.) 403; *Mosier's Appeal*, 56 Penn. St. 76; *Hoover v. Epler*, 52 Penn. St. 522; *Kyner v. Kyner*, 6 Watts (Penn.), 221; *Chapman, J.*, in *Amory v. Lowell*, 1 Allen (Mass.), 504; *Smith v. Harrison*, 33 Ala. 706.

⁴ *Hewitt, in re*, 25 N. J. Eq. 210; *Furnold v. Missouri Bank*, 44 Mo. 338.

⁵ *Matthews v. Aikin*, 1 N. Y. 595; *Hoover v. Epler*, 52 Penn. St. 522; *Kyner v. Kyner*, 6 Watts (Penn.),

⁶ *Harnsberger v. Lancey*, 33 Gratt. (Va.) 527; *Stevens v. Goodenough*, 26 Vt. 676; *Lewis v. Palmer*, 28 N. Y. 271; *Smith v. Foran*, 43 Conn. 244; *Barker v. Parker*, 4 Pick. (Mass.) 505.

⁷ *Harrison v. Bisland*, 5 Rob. (La.) 204; *Fort v. Union Bank*, 11 La. Ann. 708; *Roth v. Harkson*, 18 La. Ann. 705; *Stiewell v. Burdell*, 18 La. Ann. 17; *Brice v. Watkins*, 30 La. Ann. 21; *Gadsden v. Brown*, 1 Speers Eq. (So. Car.) 41; *Shinn v. Budd*, 14 N. J. Eq. 234; *Griffin v. Proctor*, 4 Bush (Ky.), 471.

⁸ *Knouf's Appeal*, 91 Penn. St. 78; *Bender v. George*, 92 Penn. St. 36; *Lloyd v. Galbraith*, 32 Penn. St. 103; *McGinniss's Appeal*, 16 Penn. St. 445; *Keely v. Cassidy*, 93 Penn. St. 318; *Hatch v. Kimball*, 16 Maine, 146; *Reilly v. Mayer*, 12 N. J. Eq. 55.

courts, subrogation has been defined as that change by which another person has been put into the place of a creditor, and which makes the rights of the creditor and any securities that he holds pass to the person who, by being subrogated to him, enters into his right.¹ It is said to be a legal fiction, by force of which an obligation extinguished by a payment made by a third person is treated as still subsisting for the benefit of this third person, so that by means of it one creditor is substituted to the rights, remedies, and securities of another.² The party who is subrogated is regarded as constituting one and the same person with the creditor whom he succeeds.³ It takes place for the benefit of a person who, being himself a creditor, pays another creditor whose debt is preferred to his by reason of privileges or mortgages,⁴ being obliged to make the payment, either as standing in the situation of a surety, or that he may remove a prior incumbrance from the property on which he relies to secure his payment.⁵

§ 3. **Who will be subrogated.** — Subrogation, as a matter of right, independently of agreement, takes place only for the benefit of insurers;⁶ or of one who, being himself a creditor, has satisfied the lien of a prior creditor;⁷ or for the benefit of a purchaser who has extinguished an incumbrance upon the estate which he has purchased;⁸ or of a co-obligor or surety who has paid the debt which ought, in whole or in part, to have been met by another;⁹ or of an heir who has paid the

¹ Domat, Civ. Law, pt. I., l. III., t. 1, § 6; King v. Dwight, 3 Rob. (La.) 2.

² Guyot, *Répertoire Universelle*, Subrogation, § 2; Merlin, *Inst. de Droit*, Subrogatio.

³ Massé, *Droit Commercial*, Payment in subrogation.

⁴ Spiller v. Creditors, 16 La. Ann. 292.

⁵ Griffin v. Orman, 9 Fla. 22; Shinn v. Budd, 14 N. J. Eq. 234;

Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 370.

⁶ Postea, Ch. VII.

⁷ Ellsworth v. Lockwood, 42 N. Y. 89; Mosier's Appeal, 56 Penn. St. 76; Miller v. Whittier, 36 Maine, 577.

⁸ Kirkland, *in re*, 14 N. B. R. 139; Corbally v. Hughes, 59 Ga. 493; Armentrout v. Gibbons, 30 Gratt. (Va.) 632.

⁹ Cottrell's Appeal, 23 Penn. St. 294; Young v. Vough, 23 N. J. Eq. 325; Silk v. Eyre, Irish Rep. 9 Eq. 393.

debts of the succession;¹ or of one who has paid his own debt, the burden of which has, for a valuable consideration, been assumed by another.² In other words, the demand of a creditor which is paid with the money of a third person, without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished;³ but the doctrine of subrogation will be applied where the person claiming its benefit has been compelled to pay the debt of a third person in order to protect his own rights or to save his own property.⁴ And it will be applied only in favor of one who has actually performed the obligations of another,⁵ and thereby entitled himself to the rights and advantages incident to the discharge of such obligations. No such merit can be attached to the mere extinguishment of another's right by legal means. Consequently, a prior mortgagee acquires no right, by the foreclosure of his mortgage, to redeem from an incumbrance subsequent to his own.⁶

§ 4. **It is a Mode of Equitable Relief.** — The law of subrogation is the exercise of the equitable powers of the court, to afford a summary relief to a meritorious creditor, who might otherwise be subjected to loss by the operation of proceedings at law against the estate or funds of one who is indebted both to him and to others. This equitable remedy is allowed only when it does not conflict with the legal or equitable rights of other creditors of the common debtor. The principle is one of equity merely, and will be carried out in the exercise of a proper equitable discretion, with a due regard

¹ *Clowes v. Dickinson*, 5 Johns. Ch. (N. Y.) 235; *Brigden v. Cheever*, 10 Mass. 450; *Mitchell v. Mitchell*, 8 Humph. (Tenn.) 359; *Tilghman, C. J.*, in *Guier v. Kelly*, 2 Binney (Penn.), 294, 299; *Jenness v. Robinson*, 10 N. H. 215.

² *Kinnear v. Lowell*, 34 Maine, 299.

³ *Shinn v. Budd*, 14 N. J. Eq. 234; *Webster's Appeal*, 86 Penn. St. 409; *Guy v. Du Uprey*, 16 Calif. 195.

⁴ *Cole v. Malcolm*, 66 N. Y. 363; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Whithed v. Pillsbury*, 13 N. B. R. 241.

⁵ *Soulié v. Brown*, 13 La. Ann. 521; *Judah v. Judd*, 1 Conn. 309; *Hoover v. Epler*, 52 Penn. St. 522; *Carter v. Neal*, 24 Ga. 346.

⁶ *Goodman v. White*, 26 Conn. 317; *Townsend v. Ward*, 27 Conn. 610; *Morris v. Oakford*, 9 Penn. St. 498.

to the legal and equitable rights of others. The claimant who asks this equity must be governed by the common maxim, *Sic utere tuo ut alienum non lædas*.¹ Being a doctrine of mere equity and benevolence, it will never be enforced at the expense of a legal right. Thus, where the claim of a surety for money paid by him on a judgment against his principal has been defeated at law, the surety cannot in equity be substituted to the rights of the creditor in the original judgment,² as would otherwise be the case.³ And since no one can rest a claim to equitable redress upon his own wrong, a collector of internal revenue who has deposited taxes collected by him in a savings bank which has since failed, and who has thereupon paid the amount due to the United States from his own funds, will not be subrogated to the rights of the United States as a preferred creditor of the bank in bankruptcy.⁴ Nor can one by subrogation acquire the right to alter the disposition of a fund which has already been fixed by law.⁵

§ 5. **Doctrine adopted in Louisiana.** — In Louisiana, subrogation to the rights of a creditor in favor of a third person who pays him is either conventional or by operation of law. Conventional subrogation takes place when the creditor, upon receiving payment from a third person, subrogates him to his own rights and remedies against the debtor ;⁶ this subrogation will not be implied, but must be formally expressed at the same time as the payment.⁷ This conventional subrogation is equivalent to an absolute transfer or assignment of the debt with its accessories.⁸ Legal subrogation, or subrogation by operation of law, takes place only for the benefit of one who,

¹ *Chambers, J.*, in *McGinniss's* Appeal, 16 Penn. St. 445, 447.

² *Fink v. Mahaffy*, 8 Watts (Penn.), 384.

³ *Postea*, §§ 135–137.

⁴ *Wilkinson v. Babbitt*, 4 Dillon C. C. 207.

⁵ *Williams v. Aylesbury Railw. Co.*, L. R. 9 Ch. 684.

⁶ *Virgin's Succession*, 18 La. Ann. 42.

⁷ *Harrison v. Bisland*, 5 Rob. (La.) 204; *Sewall v. Howard*, 15 La. Ann. 400; *Virgin's Succession*, 18 La. Ann. 42; *Hoyle v. Cazabat*, 25 La. Ann. 438; *Brice v. Watkins*, 30 La. Ann. 21.

⁸ *Oakey v. Sheriff*, 13 La. Ann. 373.

being himself a creditor, pays another creditor whose claim is preferable to his own by reason of privileges or mortgages; of a purchaser of immovable property who employs the price of his purchase in paying the creditors to whom the inheritance was mortgaged; of one who, being bound with others or for others for the payment of a debt, had an interest in discharging it; and of the beneficiary heir who has paid with his own funds the debts of the succession.¹ Thus, an agent who has paid over to his principal from his own funds the amount due upon a mortgage-note intrusted to him, no express subrogation having been made because the principal supposed that the money came from the debtor, acquires no interest in the note; but both that and the mortgage are extinguished.² And full payment of the amount agreed upon is a condition precedent of conventional, as well as of legal subrogation.³

§ 6. **Follows the Discharge of an Obligation. Adds Nothing to the Right.** — Subrogation to the rights of a creditor is to be distinguished from an assignment of the debt, by the fact that the latter assumes the continued existence of the debt, while the former follows only upon its payment.⁴ Before the right of subrogation accrues, there must be a discharge of the legal obligation resting upon the party ultimately liable.⁵ But the subrogation of an insurer to the remedies of the insured for the destruction of the insured property proceeds rather upon an implied assignment than upon a satisfaction of the cause of action, at any rate in cases of insurance against loss by fire.⁶ And the party for whose benefit the doctrine of subrogation is exercised can acquire no greater rights than those of the party

¹ *Stiwell v. Burdell*, 18 La. Ann. 17.

² *Brice v. Watkins*, 30 La. Ann. 21.

³ *Soulié v. Brown*, 13 La. Ann. 521.

⁴ *Sutherland, J.*, in *Ellsworth v. Lockwood*, 42 N. Y. 89, 97; *Colt, J.*, in *Lamb v. Montague*, 112 Mass. 353.

⁵ *Simrall, J.*, in *Staples v. Fox*, 45 Miss. 667, 680.

⁶ *Mason v. Sainsbury*, 3 Doug. 61; *London Ass. Co. v. Sainsbury*, 3 Doug. 245; *Yates v. White*, 4 Bing. N. C. 272; *Hall v. Nashv. & Chatt. R. R. Co.*, 13 Wallace, 367; *Hart v. Western R. R. Co.*, 13 Met. 99; *Peoria Ins. Co. v. Frost*, 37 Ills. 333.

for whom he is substituted ; if the latter had not a right of recovery, the former can acquire none.¹

§ 7. **Instances. Subrogation of a Sheriff.** — If a sheriff, at the request of the defendant in an execution which has been committed to him for collection, neglects to make a levy and collect the money and return the execution according to its command, thus making himself personally liable for the amount of the judgment, and then, on threats of legal proceedings against himself and his sureties, pays the judgment, he is entitled in equity to be subrogated to all the rights of the judgment-creditor against the defendant,² especially if he took an assignment of the judgment.³ And if, after he has, by his neglect to collect the execution, become himself liable to pay it, he takes out an *alias* for his own use, he thereby becomes subrogated to the rights of the creditor.⁴ But this right of subrogation, where no assignment of the judgment has been taken, cannot in New Jersey be enforced in an action at law.⁵ And the bare payment by a sheriff with his own funds of an execution put into his hands will not subrogate him to the lien of the judgment as against subsequent creditors of the same defendant.⁶ If the liability of the sheriff is for not paying over to the creditor the avails of the defendant's property which he has sold on the execution, then he cannot be subrogated.⁷

§ 8. **Subrogation of one who has advanced Money for the Payment of an Incumbrance.** — Where money has been loaned upon a defective mortgage for the purpose of discharging a prior valid incumbrance, and has actually been so applied, the mortgagee may be subrogated to the rights of the prior incum-

¹ Alliance Ins. Co. v. Louisiana Ins. Co., 8 La. 1 ; Simpson v. Thomson, 3 App. Cas. 279.

² Staples v. Fox, 45 Miss. 667 ; Bellows v. Allen, 23 Vt. 169.

³ Heilig v. Lumley, 74 Nor. Car. 250. See also Grant v. Ludlow, 8 Ohio St. 1.

⁴ Evarts v. Hyde, 51 Vt. 183.

⁵ Stout v. Dilts, 1 Southard (N. J.), 218.

⁶ Clevinger v. Miller, 27 Gratt. (Va.) 740.

⁷ Bellows v. Allen, 23 Vt. 169.

brancer whom he has thus satisfied,¹ there being no intervening incumbrances.² But it is necessary both that the money should have been advanced for the purpose of discharging the prior incumbrance, and that it should actually have been so applied.³ So, where a husband and wife gave a mortgage for money lent to them for the purpose of discharging a prior incumbrance, which was accordingly done, and the wife turned out to have been an infant at the time of the new mortgage, the mortgagee was subrogated to the rights of the prior incumbrancer as against the wife.⁴ And if it is expressly agreed that the old incumbrance shall be kept alive as security for the new advance, but the debtor in fraud of his agreement procures it to be discharged, the person making the advance will be subrogated to the benefit of the prior lien, even against other incumbrancers prior to himself, whose rights have not been acquired on the faith of the apparent discharge.⁵ But if land is conveyed and accepted in discharge of a mortgage upon other property, and the title afterwards turns out to be defective, though this defect may be the subject of a new demand, it cannot operate to revive the original mortgage, even with the mortgagor's consent, to the prejudice of rights acquired by others in the mean time.⁶ And where a mortgage has been cancelled and discharged, and a new security upon the same land has been taken for the debt, the mortgage will be regarded as if it had never existed, and intervening incumbrances or attachments will be let in.⁷

¹ *Lockwood v. Marsh*, 3 Nevada, 138; *Gilbert v. Gilbert*, 39 Iowa, 657. This mortgage was executed by a trustee who had the power to give mortgages for the discharge of the prior incumbrance; but the mortgage was invalid for lack of proper execution, and the plaintiff would have had no redress on his security but for the equitable doctrine of subrogation. The same rule was applied in *Levy v. Martin*, 48 Wisc. 198.

² *Kitchell v. Mudgett*, 37 Mich. 82.

³ *Barber v. Lyon*, 15 Iowa, 37.

⁴ *Sueller v. McIntyre*, 6 Abbott, N. H. Cas. 469.

⁵ *Downer v. Miller*, 15 Wisc. 612. See also *White v. Knapp*, 8 Paige Ch. (N. Y.) 173; *Cole v. Edgerley*, 48 Maine, 108.

⁶ *Lasselle v. Barnett*, 1 Blackf. (Ind.) 150.

⁷ *Stearns v. Godfrey*, 16 Maine, 158; *Woollen v. Hillen*, 9 Gill (Md.), 185.

§ 9. **Of one who has been compelled to pay the Debt of another.** — A third person who pays off a mortgage-debt for his own protection may be subrogated to the place of the mortgagee, and may retain the mortgage for his reimbursement.¹ One who pays taxes which are a lien upon land to which he must look for the payment of his debt, in order to preserve the property from the lien, will be entitled by subrogation to reimbursement out of the property itself.² So, a grantee of land who, through neglect to record his deed, has had the land taken from him upon a judgment recovered against his grantor, may by subrogation in equity claim the benefit of a mortgage held by the judgment-creditor to secure the debt upon which the judgment was rendered, so far as the same is not required for the full satisfaction of the debt, and to the extent of his loss by the levy upon his land.³ “The plaintiff,” said Mr. Justice Chapman, “has paid his grantor’s debt, which his grantor ought to have paid himself; and it is but just that he should have the benefit of the security which his grantor had previously given to the creditor for the debt.”⁴

§ 10. **Of a Carrier.** — Where notes issued by a bank had been stolen while in the course of transportation by an express company, and subsequently destroyed, and the company, being liable for the loss, paid the amount thereof, it was held that, upon such payment, the property in the notes vested in the express company; and, upon proof of their destruction, it was allowed to recover their amount from the bank.⁵ So, where a carrier has by mistake delivered to one person goods which had been sold and consigned to another, and the former has appropriated them for his own use, the carrier, after satisfying the real owner for the loss, may recover the value of the goods from the person who has thus received them.⁶

¹ Coster, *in re*, 2 Johns. Ch. (N. Y.) 503.

² Whittaker v. Wright, 35 Ark. 511.

³ Wall v. Mason, 102 Mass. 313.

⁴ Chapman, J., in Wall v. Mason, *supra*.

⁵ Hagerstown Bank v. Adams Express Co., 45 Penn. St. 419.

⁶ Brown v. Hodgson, 4 Taunt. 189; Coles v. Bulman, 6 C. B. 184.

§ 11. **General Doctrine of Subrogation.**—In short, the doctrine of subrogation is that when one has been compelled to pay a debt which ought to have been paid by another, he is entitled to a cession of all the remedies which the creditor possessed against that other. To the creditor they may have been both equally liable; but if, as between themselves, there is a superior obligation resting upon one to pay the debt, the other, after paying it, may use the creditor's securities to obtain reimbursement. The doctrine does not depend upon privity; nor is it confined to cases of suretyship. It is a mode which equity adopts, to compel the ultimate discharge of a debt by him who in equity and good conscience ought to pay it, and to relieve him whom none but the creditor could ask to pay.¹ Although, as between debtor and creditor, the debt may be extinguished, yet, as between the person who has paid the debt and the other parties, the debt is kept alive, so far as may be necessary to preserve the securities.² When the money due upon a debt is paid, this will operate as a discharge of the indebtedness, or in the nature of an assignment of it, subrogating him who pays it to the place of the creditor, as may best serve the purposes of justice and the just intent of the parties.³

¹ *Strong, J.*, in *McCormick v. Irwin*, 35 Penn. St. 111, 117; *Heart v. Chitt*, 7 N. H. 99; *Starr v. Ellis*, 6 Johns. Ch. (N. Y.) 395; *Cass v. Martin*, 6 N. H. 25; *Barker v. Parker*, 4 Pick.

² *Chapman, J.*, in *Wall v. Mason*, 102 Mass. 316. (Mass.) 505; *Russell v. Austin*, 1 Paige Ch. (N. Y.) 192; *Peltz v. Clarke*,

³ *Parker, J.*, in *Robinson v. Leavitt*, 5 Peters, 481.

CHAPTER II.

SUBROGATION IN CASES WHERE DIFFERENT PARTIES HAVE SUCCESSIVE CLAIMS UPON THE SAME PROPERTY, BY MORTGAGE, LIEN, OR PURCHASE.

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§ 12. **Subrogation of a Junior Incumbrancer upon Payment of a Prior Incumbrance.** — As a general rule, all persons having an interest in property subject to an incumbrance by which their interest may be prejudiced or lost have a right to disengage the property from such incumbrance by the payment of the debt or charge which creates it;¹ and if such debt be one for which the ultimate liability rests upon another party, they will, upon their payment, be subrogated to the right of the creditor against the ultimate debtor,² and against the property upon which the debt was a charge.³ A mortgagee can make no effectual resistance to a claim for subrogation by one who tenders to him his debt and costs, and who has a subordinate interest in the property, which would either be lost or seriously injured without the proposed substitution.⁴ So, if a second mortgagee is in danger of losing his security by the foreclosure of the first mortgage, he may redeem from the first mortgagee, or pay the debt secured by the first mortgage, and may thereupon look to the mortgaged property for his reimbursement,⁵

¹ *Powers v. Golden Lumber Co.*, 43 Mich. 468; *Willis v. Jelineck*, 27 Minn. 18.

² *Southworth v. Scofield*, 51 N. Y. 513; *Evans v. Saunders*, 3 Lea (Tenn.), 734; *Exall v. Partridge*, 8 T. R. 308.

³ *Denman v. Nelson*, 31 N. J. Eq. 452; *Bigelow v. Cassedy*, 26 N. J. Eq. 557; *Coster, in re*, 2 Johns. Ch. (N. Y.) 503; *Dings v. Parshall*, 7 Hun (N. Y.), 522; *Page v. Foster*, 7 N. H. 392; *Downer v. Fox*, 20 Vt. 388; *Young v. Williams*, 17 Conn. 393; *Mosier's Appeal*, 56 Penn. St. 76;

Darst v. Bates, 95 Ills. 493; *White v. Hampton*, 13 Iowa, 259; *Carter v. Taylor*, 3 Head (Tenn.), 30; *Staples v. Fox*, 45 Miss. 667; *Griswold v. Marshman*, 2 Ch. Cas. 170.

⁴ *McLean v. Tompkins*, 18 Abbott Pr. (N. Y.) 24.

⁵ *Bigelow v. Cassedy*, 26 N. J. Eq. 557; *Wood v. Hubbard*, 50 Vt. 82; *Weld v. Sabin*, 20 N. H. 533; *Baker v. Pierson*, 6 Mich. 522; *Flachs v. Kelly*, 30 Ills. 462; *Marshall v. Rudick*, 28 Iowa, 487; *Arnold v. Foote*, 7 B. Mon. (Ky.) 66.

even against intervening incumbrances.¹ On the same principle, as a carrier's lien for the carriage of the specific goods is prior to the vendor's right of stoppage *in transitu*, and the carrier may insist upon retaining possession until these charges are paid, an officer who pays these charges to the carrier in order to obtain the goods for the vendor is substituted to the carrier's right of possession until he is repaid.² The general rule is that a lien-creditor, on paying the mortgage or other lien which is prior to his own, is subrogated by law to the rights of the creditor whose debt he has paid.³ A second mortgagee who, to prevent a foreclosure of the first mortgage, redeems from it will be subrogated to its lien against an intervening or subsequent attachment,⁴ and an assignment of the mortgage will not be necessary for this purpose.⁵ Though a stranger cannot set up an outstanding satisfied mortgage as a basis of title to the property, yet the equitable owner of the land, whose debt it was not, but who has paid it in order to protect his property, may do so.⁶ But a release from a prior to a subsequent mortgagee, nothing more appearing, will operate merely as an extinguishment of the mortgage.⁷

§ 13. **Subrogation will be made to serve the Purposes of Justice and the Intent of the Parties.**—“There are cases,” said Mr. Justice Parker,⁸ “in which a party who has paid money due upon a mortgage is entitled, for the purpose of effecting the substantial justice of the case, to be substituted in the place of the incumbrancer, and treated as assignee of the mortgage, and is enabled to hold the land as if assignee, not-

¹ Walker v. Stone, 20 Md. 195; Allen v. Wood, 31 N. J. Eq. 103.

² Rucker v. Donovan, 13 Kans. 251.

³ Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 370; Brown v. Simons, 44 N. H. 475; Armstrong v. McAlpin, 18 Ohio St. 184; Russell v. Howard, 2 McLean C. C. 489; Southard v. Dorrington, 10 Nebraska, 119; Ventress v. Creditors, 20 La. Ann. 359.

⁴ Ward v. Seymour, 51 Vt. 320; Downer v. Fox, 20 Vt. 388; Flachs v. Kelly, 30 Ills. 462.

⁵ Moore v. Beasom, 44 N. H. 215. ⁶ Peltz v. Clarke, 5 Peters, 481; Bacon v. Van Schoonhoven, 19 Hun (N. Y.), 158.

⁷ Hill v. West, 8 Ohio, 222.

⁸ Robinson v. Leavitt, 7 N. H. 99 et seq.

withstanding the mortgage itself has been cancelled and the debt discharged.¹ The true principle, I apprehend, is, that where money due upon a mortgage is paid, it shall operate as a discharge of the mortgage or in the nature of an assignment of it, as may best serve the purposes of justice and the just intent of the parties.² Many cases state the rule in equity to be that the incumbrance shall be kept on foot or considered extinguished or merged, according to the intent or the interest of the party paying the money; but the decisions themselves, it is believed, will generally be found in accordance with the principle above stated.³ There is another class of cases in which he who has paid money due upon a mortgage of land to which he had some title which might be affected or defeated by the mortgage, and who was thus entitled to redeem, has the right to consider the mortgage as subsisting in himself, and to hold the land as if it subsisted, until others interested in the redemption, or who held also the right to redeem, have paid a contribution.⁴ And it makes no difference in either of these classes, as I conceive, whether the party on payment of the money took an assignment of the mortgage or a release, or whether a discharge was made and the evidence of the debt cancelled.⁵ The debt itself may be held still to subsist in him who paid the money, as

¹ Citing *Marsh v. Rice*, 1 N. H. 167; *Peltz v. Clarke*, 5 Peters, 481; *Coster, in re*, 2 Johns. Ch. (N. Y.) 503; *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370; *Dale v. McEvers*, 2 Cow. (N. Y.) 118.

² Citing *Starr v. Ellis*, 6 Johns. Ch. (N. Y.) 395. See also *Hastings v. Stevens*, 29 N. H. 573.

³ Citing *Gardner v. Astor*, 3 Johns. Ch. (N. Y.) 53; *James v. Johnson*, 6 Johns. Ch. (N. Y.) 425; *S. C. on error*, 2 Cow. (N. Y.) 246; *Burnet v. Denniston*, 5 Johns. Ch. (N. Y.) 35; *Mills v. Comstock*, 5 Johns. Ch. (N. Y.) 214; *Freeman v. Paul*, 3 Greenl. (Me.) 260; *Thompson v. Chandler*, 7 Greenl. (Me.) 377; *Har-*

vey v. Hurlburt, 3 Vt. 561; *Marshall v. Wood*, 5 Vt. 250; *Lockwood v. Sturdevant*, 6 Conn. 374; *Kirkham v. Smith*, 1 Ves. Sen. 258; *Shrewsbury v. Shrewsbury*, 1 Ves. Jun. 233; *Compton v. Oxenden*, 2 Ves. Jun. 264; *Forbes v. Moffatt*, 18 Ves. 384; *Buckinghamshire v. Hobart*, 3 Swanst. 186.

⁴ Citing *Cass v. Martin*, 6 N. H. 25; *Swain v. Perine*, 5 Johns. Ch. (N. Y.) 482-491; *Carll v. Butman*, 7 Greenl. (Me.) 102; *Taylor v. Bassett*, 3 N. H. 294; *Russell v. Austin*, 1 Paige (N. Y.), 192.

⁵ Citing *Snow v. Stevens*, 15 Mass. 278; *Barker v. Parker*, 4 Pick. (Mass.) 505; *Wade v. Howard*, 6 Pick. (Mass.) 492.

assignee, so far as it ought to subsist, in the nature of a lien upon the land, and the mortgage be considered in force for his benefit, so far as he ought in justice to hold the land under it, as if it had been actually assigned to him.”¹

§ 14. **Subrogation upon Redemption from a Prior Incumbrance.** — One who has paid the money due upon a mortgage of lands to which he had a title that might have been defeated thereby has the right to hold the lands as if the mortgage subsisted and had been assigned to him,² until he has received the amount due upon it from some one who has the right to redeem, whether he took a discharge³ or an assignment⁴ of the mortgage. The mortgage may, for his benefit, be considered as still subsisting, though formally discharged, so far as he ought in justice to hold the property.⁵ So an incumbrancer may redeem from a paramount tax title, and be subrogated to it for his protection.⁶ A second mortgagee who has paid taxes and assessments which constituted a paramount lien upon the land may hold the land against the first mortgagee until reimbursed for these expenditures.⁷ A tenant for years has the right to redeem from a mortgage which is prior to the creation of his tenancy, and upon redemption will stand in the place of the mortgagee, and be subrogated to his rights against the mortgagor and the reversioner.⁸ And in New Jersey he will have the right, upon redemption, to have the bond and mortgage delivered to him uncanceled, which in equity will be equivalent to an assignment of them to himself.⁹ But the tenant cannot hold the land against a prior incumbrancer by simply paying

¹ Citing *Pratt v. Law*, 6 Cranch, 456, 498. *Johnson v. Elliott*, 26 N. H. 67; *Heath v. West*, 26 N. H. 191.

² *Twombly v. Cassidy*, 82 N. Y. 155; *Manwaring v. Powell*, 40 Mich. 371; *Taylor v. Heggie*, 83 Nor. Car. 244. ⁶ *Pratt v. Pratt*, 96 Ills. 184; *Johnson v. Payue*, 11 Nebraska, 269.

⁷ *Fiacre v. Chapman*, 32 N. J. Eq. 463.

⁸ *Towle v. Hoit*, 14 N. H. 61.

⁸ *Averill v. Taylor*, 8 N. Y. 44;

⁴ *White v. Hampton*, 13 Iowa, 259. *Loud v. Lane*, 8 Met. (Mass.) 517.

⁹ *Hamilton v. Dobbs*, 19 N. J. Eq.

⁵ *Cobb v. Dyer*, 69 Maine, 494; 227.

the interest as it accrues; nor can he, on paying the debt, require a formal assignment of the incumbrance. He can only redeem, and then claim his subrogation.¹ And he must pay the entire amount of an incumbrance which is senior to his own estate.²

§ 15. **Subrogation of Junior Incumbrancer compelled to pay a Prior Charge.** — If a mortgagee, after having taken possession of the mortgaged premises, has been compelled, in order to protect his title, to pay the amount due upon a prior mortgage, he will be subrogated to the rights of the prior mortgagee, and may hold the land for the sum so paid by himself, even against one whose title to the property has accrued after the discharge of the prior mortgage upon the record, if the whole amount claimed upon both mortgages is not greater than appears to be due by the record.³ And he may also hold for the payment of the debt secured by the prior mortgage the parties who were personally liable therefor.⁴ When a creditor whose demand has been secured by the assignment of a mortgage purchases, at the request of the debtor, a judgment which constitutes a paramount lien on the mortgaged premises, with the express understanding that it shall be tacked to the mortgage and paid out of the fund, he is entitled to have it tacked to his mortgage and paid out of the mortgaged premises.⁵ The necessary expenses incurred by a subsequent mortgagee to redeem from a prior mortgage which ought to have been paid by the mortgagor,⁶ or to remove a paramount right of dower,⁷ are justly chargeable by him upon the mortgaged estate. And if a junior incumbrancer takes up a prior incumbrance which was also a lien upon other property than that to which he had himself a claim, he may resort to the other property bound by the

¹ *Lamson v. Drake*, 105 Mass. 564;
Bigelow v. Cassidy, 26 N. J. Eq. 557.

² *Street v. Beal*, 16 Iowa, 68; 797.
Massie v. Wilson, 16 Iowa, 390;
Knowles v. Rablin, 20 Iowa, 101.

³ *Davis v. Winn*, 2 Allen (Mass.),
 111.

⁴ *Matteson v. Marks*, 31 Mich. 421.

⁵ *Cullum v. Mobile Bank*, 23 Ala.

⁶ *Miller v. Whittier*, 36 Maine,
 577.

⁷ *Pierce v. Faunce*, 53 Maine, 351.

prior incumbrance, and enforce the lien thereon for his reimbursement.¹ If the debt secured by the incumbrance which he has thus paid bore a higher rate of interest than his own, he will be allowed the increased rate of interest on his payment.² This right of a junior mortgagee cannot be defeated by any arrangement between the prior incumbrancer and the mortgagor, or by any adjudication of their respective rights to which the junior mortgagee was not a party.³

§ 16. **Duty of Prior to Junior Incumbrancer.** — In England it is held that a mortgagee is bound to convey and hand over the title-deeds to any person having an interest in the equity of redemption, though only a partial one, by whom he is paid off. But the conveyance should be expressed to be subject to the right of redemption of all persons who hold other interests. When the party redeeming has only contracted to purchase an interest in the premises, the mortgagee need not convey until the purchaser has accepted the title.⁴ The prior mortgagee ought, without judicial proceedings, to accept an offer of payment made to him by a junior incumbrancer, and thereupon to convey to him the mortgaged estate, with or without the concurrence of the mortgagor.⁵ And if he refuses to do so on demand, and subsequently acquires from the mortgagor the equity of redemption, which was of sufficient value to pay the junior incumbrance, he will be himself held for the amount of the latter.⁶

§ 17. **Junior Incumbrancer's Right of Redemption.** — A junior incumbrancer has the right to redeem from a prior mortgage by paying the amount which is due according to its terms as recorded;⁷ the facts shown by the record cannot be contradicted to his prejudice.⁸ When he offers to redeem, the prior

¹ *Peter v. Smith*, 5 Cranch C. C. 383.

⁴ *Pearce v. Morris*, L. R. 5 Ch. 227.

² *Harper v. Ely*, 70 Ills. 581; *Mosier v. Norton*, 83 Ills. 519.

⁵ *Smith v. Green*, 1 Coll. C. C.

³ *Davis v. Rogers*, 28 Iowa, 413; *Frost v. Yonkers Bank*, 8 Hun (N. Y.), 26.

⁶ *Griswold v. Marshman*, 2 Ch. Cas. 170.

⁷ *Whittacre v. Fuller*, 5 Minn. 508.

⁸ *Gibbons v. Hoag*, 95 Ills. 45.

mortgagee cannot tack to his demand another debt due to him from the mortgagor, and not a charge upon the premises sought to be redeemed, of which the junior incumbrancer was bound to take notice.¹ Even a mortgagee's right of subrogation to the benefit of prior liens discharged by him, if not appearing of record, cannot be enforced against those who have taken interests in reliance upon the record, to an amount greater than the total sum which appears by the record to be due.² As against the junior incumbrancer, no new terms can be incorporated into the prior mortgage, no new indebtedness can be secured by it. Thus, where the parties to the mortgage stipulated for the payment of a higher rate of interest upon the mortgage-debt than was provided for by the terms of the mortgage as recorded, it was held that, while this contract might be binding upon the mortgagor personally, yet the excess of interest could not be made a lien upon the land to the prejudice of subsequent incumbrancers.³ Payments which have been made by the mortgagor upon the indebtedness secured by the first mortgage cannot afterwards be transferred to another account, to the prejudice of a second incumbrancer, by the mortgagor and the first mortgagee.⁴ Where property was subject to the lien of a judgment, and then to four successive mortgages, and the holder of the judgment agreed with the first mortgagee to postpone his lien to that of the fourth mortgagee, and then sold the property under his judgment to the first mortgagee, who had no notice of this agreement, it was held that the first mortgagee was by his purchase subrogated to the lien of the judgment, and that the fourth mortgagee could not redeem from him without paying the cost of buying in the property under the judgment as well as the amount which was due upon the first mortgage.⁵

¹ *Burnet v. Denniston*, 5 Johns. Ch. (N. Y.) 35.

² *Davis v. Winn*, 2 Allen (Mass.), 111.

³ *Gardner v. Emerson*, 40 Ills. 296; *Perrin v. Kellogg*, 38 Mich. 720.

⁴ *York County Savings Bank v. Roberts*, 70 Maine, 384.

⁵ *Frost v. Yonkers Bank*, 8 Hun (N. Y.), 26.

§ 18. **When Junior Incumbrancer entitled to Subrogation.**— Although a junior incumbrancer is entitled to redeem from a prior mortgage, and although, if he is not himself the principal debtor, but is compelled to redeem for the protection of his own lien upon the premises, he will be entitled upon redemption to be subrogated for his reimbursement to the rights of the senior mortgagee, yet, if the debt secured by his own mortgage is not yet due or payable, he cannot insist upon his right to pay off the first mortgage and to be subrogated to the position of the prior mortgagee, without showing that this is necessary for his own protection or for the preservation of his own security. Subrogation in equity proceeds upon the ground that it is necessary for the protection of the party who seeks it; and this will be the case when it is necessary for him, in order to get the benefit of his own security, to disengage the property from the previous incumbrance. If his own mortgage is payable, and he cannot get his payment without clearing away the previous incumbrance, or if the prior mortgagee is himself seeking to foreclose, then he may rightfully insist upon redeeming and upon being subrogated to the rights of the prior mortgagee.¹ After a decree for the foreclosure of a prior mortgage has been rendered in proceedings to which the junior incumbrancer was a party, the latter cannot then claim a decree of subrogation, or have the sale of the premises enjoined, unless he can show that the payment of the prior mortgage or its enforcement by foreclosure and sale would work him an injustice; as mere junior mortgagee, his rights are sufficiently protected by the opportunity to purchase at the sale, or to pay off the prior incumbrance before the sale.²

§ 19. **Subrogation of one advancing Money for the Payment of an Incumbrance.**— Where a person advances money to pay off a mortgage-debt under an agreement with the owner of the equity of redemption or his representative that he shall hold

¹ *Jenkins v. Continental Ins. Co.*,
12 How. Pr. (N. Y.) 66.

² *Bloomington v. Barnard*, 7 Hun
(N. Y.), 459.

the mortgage as security for his advance, but the mortgage, instead of being assigned to him, is discharged in whole or in part, he is yet entitled as against subsequent parties in interest to be subrogated to the rights of the mortgagee and to enforce the mortgage;¹ though if the agreement had been that he should depend upon a new security which was given to him, he could not be subrogated to the charge which he had paid.² And where a creditor, having taken on execution his debtor's lands, which were subject to a previous mortgage, subsequently paid off the mortgage with money which he borrowed for that purpose of a stranger, to whom he gave therefor a new mortgage upon the same land, and afterwards his levy proved to be defective, and the new mortgage was accordingly invalid as such, the new mortgagee was held, as against the debtor's grantee, to be subrogated to the rights of the prior incumbrancer, the payment having been necessary to avoid a foreclosure of the first mortgage.³ The same principle was applied in England in a case in which the plaintiff recovered a judgment against a railway company, and procured his judgment to be made a charge upon the company's property. After this, a scheme of arrangement was confirmed by the court, by which the company was authorized to create certain amounts of debenture A and of debenture B stock. Debenture A stock was to be applied, first, in payment of the mortgage debentures of the company, and of certain costs, the stock applied for these purposes having priority in the payment of interest over the residue of the stock, which residue was to be applied in paying unpaid vendors of land. Debenture B stock was to be applied in paying off debentures of the company which were not secured by mortgage, and in meeting other debts. The income of the company was to be applied to pay, first, rent-charges granted to vendors of land; second, interest on preferred debenture A

¹ *Cottrell v. Finney*, L. R. 9 Ch. 30; *Lockwood v. Marsh*, 3 Nevada, 541; *King v. McVickar*, 3 Sandf. Ch. 138.

(N. Y.) 192; *Levy v. Martin*, 48 Wisc. 198; *Downer v. Miller*, 15 Wisc. 612; *Morgan v. Hammett*, 23 Wisc.

² *Small v. Stagg*, 95 Ills. 39.

³ *Paine v. Hathaway*, 3 Vt. 212.

stock ; third, interest on the residue of that stock ; fourth, interest on debenture B stock ; and, lastly, such dividends as might be payable to stockholders. The Master of the Rolls decided that the plaintiff was entitled to debenture B stock in satisfaction of his judgment ; but that he had no higher rights. The plaintiff appealed, and contended that he was not bound by the scheme, and that he had a charge on the income in priority to the holders of the A and B stocks, by whomsoever held ; for that the priority of former mortgagees and unpaid vendors of land, who had accepted payment in these new stocks, had been lost by the extinguishment of their original securities. And on his appeal it was held that he was not bound by the scheme, but that as it did not lessen his rights, so neither did it increase them : that he was not, therefore, entitled to such priority as he claimed ; but that, subject to the rights of unpaid vendors of land, the income must, in the first place, to an amount equal to that of the principal, interest, and costs due to the holders of mortgage-debentures issued before the lien of the plaintiff's execution had attached, be applied according to the scheme.¹ A person who advances money to pay off a mortgage, with the understanding and belief on his part that the mortgage is the only lien upon the land, is entitled to be subrogated to the lien of the mortgage, as against a surety who has paid a judgment, the lien of which was subsequent to the mortgage, and the payment of which appears by the record to have been otherwise provided for.² One who has paid off a mortgage-debt under the mistaken belief that the title to the land was in his wife, while it really belonged to her daughter by a previous marriage, was allowed against the daughter a charge upon the land to reimburse him for this payment,³ but not for improvements which he had made upon the land.⁴ But

¹ *Stevens v. Mid-Hants Railway Co.*, L. R. 8 Ch. 1064.

² *Green v. Millbank*, 3 Abbott New Cas. (N. Y.) 138. And see *Bur- chard v. Phillips*, 11 Paige (N. Y.), 66.

³ *Haggerty v. McCanna*, 10 C. E. Green (25 N. J. Eq.), 48.

⁴ *Haggerty v. McCanna*, *supra*; *O'Brien v. Joyce*, 117 Mass. 360.

a husband who, being sued with his wife for her debt contracted before marriage, and secured by a mortgage upon her land, allows himself after her death to be defaulted in the suit and pays the debt on execution, under the mistaken¹ supposition that he can claim the amount of her estate at law, without taking an assignment of the mortgage, cannot be subrogated to the rights of the mortgagee for his reimbursement; for he paid the debt, not to protect an imaginary estate in himself or his wife, but under a mistaken belief of his legal liability therefor.² Where a third party, at the instance of the mortgagor, pays a part of the mortgage-debt, but takes no assignment of the mortgage, he is not by such payment subrogated to the rights of the mortgagee as against a subsequent incumbrancer; to effect such a subrogation there must be something more than a mere payment of the money, and its silent receipt by the first mortgagee;³ nor will he be subrogated to the benefit of the mortgage as against others who are secured thereby, by his having furnished the debtor with the means to make a partial payment of the mortgage-debt.⁴

§ 20. **Where New Incumbrance given for old.**—Where a new mortgage is given for the same debt which was secured by a prior mortgage, which is thereupon satisfied and discharged, the execution of the new and the satisfaction of the old mortgage have been treated as simultaneous and dependent acts; and if the new mortgage is invalid, its holder has been subrogated to the lien of the old mortgage.⁵ But if the new mortgage covers also an additional indebtedness, this subrogation can protect only what remains due upon the old mortgage-debt.⁶ The same rule is applied where the new and

¹ Warren v. Williams, 10 Cush. (Mass.) 79.

² Warren v. Jennison, 6 Gray (Mass.), 559.

³ Commonwealth v. Chesapeake & Ohio Canal Co., 32 Md. 501.

⁴ Bockes v. Hathorn, 20 Hun (N. Y.), 503.

⁵ Dillon v. Byrne, 5 Calif. 455; Birrell v. Schie, 9 Calif. 104; Hazleton v. Lesure, 9 Allen (Mass.), 24.

⁶ Carr v. Caldwell, 10 Calif. 380; Birrell v. Schie, *supra*; Dillon v. Byrne, *supra*.

defective mortgage is given to one who at the request of the debtor advances the money to pay off the prior incumbrance, the transaction being treated in equity as an assignment of the old mortgage to the new mortgagee.¹ *A fortiori*, if the old mortgage is retained undischarged and a new mortgage is taken to secure both the old debt and the new advances,² or if the old mortgage is contemporaneously with the payment assigned by the mortgagee to the one who advances the money to pay him,³ this will not operate a discharge of the former security. The authority of these California decisions has, however, been somewhat shaken, as to intervening liens of third persons, by a later case in the same State;⁴ and elsewhere it has been held that where a mortgagee has understandingly and intentionally discharged his mortgage it cannot afterwards be reinstated to the prejudice of subsequent incumbrancers;⁵ and that where a mortgage has been discharged and its satisfaction acknowledged, and a new security taken upon the same land for the same debt, the lien of the old mortgage is gone once for all, and the new security must be postponed to such incumbrances as are prior to itself, though junior to the old mortgage.⁶ If the new security is taken for the express purpose of gaining an advantage which could not have been enjoyed under the first, the first will likewise be extinguished; as where a creditor who held a note secured by a mortgage upon a stock of goods, being told by the debtor that he had a number of notes coming due which he could not pay, delivered up his note and mortgage, and took a new

¹ *Swift v. Kraemer*, 13 Calif. 526; (N. Y.) 383; *Frazee v. Inslee*, 1 Green Carr v. Caldwell, 10 Calif. 380. (N. J. Eq.), 239; *Neidig v. Whiteford*,

² *Tenison v. Sweeny*, 1 Jones & 29 Md. 178.
La Touche, Irish Eq. 710; *Hill v.* ⁶ *Westfall v. Hintze*, 7 Abbott Beebe, 13 N. Y. 556. New Cas. (N. Y.) 236; *Woollen v.*

³ *White v. Knapp*, 8 Paige (N. Y.), 173. *Hillen*, 9 Gill (Md.), 185; *Stearns v.*

⁴ *Guy v. Du Uprey*, 16 Calif. 195; *Godfrey*, 16 Maine, 158; *Hinchman v. Emans*, 1 N. J. Eq. 100; *Iowa County v. Foster*, 49 Iowa, 676;

⁵ *Banta v. Garmo*, 1 Sandf. Ch. *Kitchell v. Mudgett*, 37 Mich. 82.

note secured by a new mortgage upon the stock as altered and added to by labor, sales, and purchases, and it was held that he could not, upon the avoidance of his new mortgage, claim to be subrogated to the lien of his former security.¹ But if an intervening incumbrance were created without the knowledge of the beneficiary therein just prior to the execution of the new mortgage, with the fraudulent intention of giving it priority over the latter, it would not be allowed a preference over such new mortgage.² And if a first mortgagee has accepted a new mortgage and surrendered his prior security for cancellation in ignorance of the existence of an intervening lien, equity will, in the absence of laches or other disqualifying facts, restore him to his original position,³ provided his remedy is promptly sought, without any acquiescence in his new position.⁴ If a mortgage has not been formally discharged, but the mortgagor has obtained from the mortgagee possession of it and of the note which it secures by means of a fraudulent pretence of payment, the mortgagee may yet foreclose the same, both against the mortgagor himself and also against those who have acquired rights under him in ignorance of the apparent satisfaction.⁵ A formal record discharge of a mortgage improvidently made by the administrator of the mortgagee, without the knowledge of the mortgagor and without consideration, will not necessarily discharge the mortgage, no other rights having intervened.⁶ A mortgagee who has been induced to surrender his security by the fraudulent representations of his mortgagor may in equity have it reinstated and enforced as if no such surrender had been made; but innocent third parties who have, after such surrender and before the revival of the incumbrance, parted with their money upon the faith of the apparent surrender, will not be prejudiced

¹ *Paine v. Waite*, 11 Gray (Mass.), 190.

² *Eggeman v. Eggeman*, 37 Mich. 436.

³ *Hutchinson v. Swartsweller*, 31 N. J. Eq. 205; *McKenzie v. McKenzie*, 52 Vt. 271.

⁴ *Childs v. Stoddard*, 130 Mass. 110.

⁵ *Grimes v. Kimball*, 8 Allen (Mass.), 153.

⁶ *Moore v. Bond*, 75 Nor. Car. 243.

by the revival.¹ Where a mortgagor made a subsequent equitable charge upon his equity of redemption, and then requested the defendant, who had no notice of the charge, to pay off the mortgage, which was done, and a receipt was indorsed upon the mortgage, and the title-deeds were handed over to the defendant, and the mortgagor then gave to the defendant a new mortgage to secure both the amount he had thus paid to the prior mortgagee and also a new advance made by himself to the mortgagor, it was held that the defendant's subsequent mortgage had priority over the equitable charge, but only to the extent of the prior mortgage which he had paid off.²

§ 21. **Holder under a Judgment Lien subrogated upon paying Prior Incumbrance.** — Where a judgment-creditor levied his execution upon land, the whole of which was subject to a prior mortgage, and the debtor was entitled, as against the judgment-creditor, to hold part of the land as a homestead, and had the same set off to himself, and afterwards the creditor was obliged to pay off the whole mortgage, which was superior to the homestead estate, it was held that the creditor was subrogated by his payment to all the rights of the mortgagee, and might enforce against the homestead estate the contribution of its proportional share of the mortgage-debt.³ One who levies an execution upon a mortgagor's equity of redemption, and then pays off the mortgages to which his levy was subject, becomes by such payment the equitable assignee of the mortgages, and is entitled to all the rights of the mortgagees in the mortgaged premises.⁴ So where the purchaser of an equity of redemption, at a sale thereof on execution against the mortgagor, paid off the mortgage and had it discharged, and then, on payment of the amount for which he had purchased at the execution sale, released to the mortgagor all the right he had acquired under the sale, it was held that he could afterwards recover from the mortgagor the amount which he

¹ Vannice v. Bergen, 16 Iowa, 555.

³ Lamb v. Mason, 50 Vt. 345;

² Pease v. Jackson, L. R. 3 Ch. 576.

Devereux v. Fairbanks, 50 Vt. 700.

⁴ Warren v. Warren, 30 Vt. 530:

had thus paid upon the mortgage.¹ One who had purchased, under an execution against the devisee thereof, land which had been devised subject to a charge for a legacy, was allowed in equity, upon the legacy being after his payment charged upon the land, to recover the amount of the legacy from the devisee.² But the creditor will not be allowed to use his right of subrogation for any other purpose than to obtain reimbursement for what he has paid upon the prior incumbrance.³

§ 22. **Where Incumbered Lands sold under a Junior Lien.**—When the equity of redemption in mortgaged lands is sold under a judgment or a junior mortgage which constitutes merely a subordinate lien upon the premises, and the sale has been consummated so that no right to redeem therefrom remains in the former owner, it has been said that the legal presumption is that the purchaser at such sale has bid only to the value of the equity of redemption;⁴ and the land which he has thus purchased becomes in equity the primary fund for the payment of the prior incumbrance. Such a purchaser cannot, upon paying and taking an assignment of the prior mortgage, collect the debt secured thereby out of the mortgagor's other property;⁵ when paid by him, the prior incumbrance is discharged and gone, to the extent of the value of the property;⁶ on the contrary, if payment of the mortgage-debt is then enforced by its holder from other property of the mortgagor, he will be subrogated to the mortgagee's lien upon the land, that he may indemnify himself out of the mortgaged premises,⁷ as he will be if upon his payment he takes an express assignment of the mortgage which he has given.⁸ And such a purchaser has no equity to require the mortgagee

¹ Gleason v. Dyke, 22 Pick. (Mass.) 390.

⁶ Booker v. Anderson, 35 Ills. 66.

⁷ Hart v. Chase, 46 Conn. 207;

² Harris v. Fly, 7 Paige (N. Y.), 421.

Funk v. McReynolds, 33 Ills. 481;

³ Lyons' Appeal, 61 Penn. St. 15.

Cox v. Wheeler, 7 Paige (N. Y.) 248;

⁴ Danchy v. Bennett, 7 How. Pr. (N. Y.) 375; Dodds v. Snyder, 44 Ills. 53.

Tice v. Annin, 2 Johns. Ch. (N. Y.) 125.

⁵ McKinstry v. Curtis, 10 Paige (N. Y.), 503.

⁸ Barker v. Parker, 4 Pick. (Mass.) 505.

to apply to the satisfaction of his demand personal property which is also embraced in his mortgage.¹ But the rule is different before the consummation of the sale, while the junior incumbrance remains merely a subordinate lien upon the premises; then the owner of the equity, if he wishes to preserve his estate, must redeem it from all the incumbrances to which it is subject;² and the junior incumbrancer may pay off the debt secured by the prior lien, and enforce it against the property.³ But there is no personal charge upon such a purchaser of the equity of redemption: if he takes an assignment of the prior mortgage, and forecloses it, and sells the property for less than the amount of the debt secured thereby, he can then maintain an action for the balance of the debt against the mortgagor; though the land has become the primary fund for the payment of the debt, yet the ultimate liability remains upon the original debtor for what the land fails to pay.⁴ And the original debtor will have no defence to an action at law by the first mortgagee against him to collect the indebtedness secured by the mortgage, although his equity of redemption has been sold on execution by another creditor; he cannot compel the purchaser at such execution sale to redeem from the prior mortgage; he must himself, where the law gives him the power to do so, redeem both from the prior mortgage and from the execution sale, or lose the land.⁵ So, one who levies upon part of an equity of redemption, and then pays off the mortgages upon the whole estate to which his levy was subject, and takes an assignment of the mortgages, becomes thereby entitled to the rights of the mortgagees in the whole of the premises.⁶ Where mortgaged land was successively attached by two different creditors of the mortgagor, and the first attaching creditor, having obtained judgment, levied on

¹ *Lovell v. Webb*, 62 Ala. 271.

⁵ *Rogers v. Meyers*, 68 Ills. 92.

² *Rogers v. Meyers*, 68 Ills. 92.

⁶ *Tichout v. Harmon*, 2 Aik. (Vt.)

³ *Southworth v. Scofield*, 51 N. Y. 513.

37; *Wheeler v. Willard*, 44 Vt. 640; *Tuttle v. Brown*, 14 Pick. (Mass.)

⁴ *Southworth v. Scofield*, *supra*.

514.

the equity of redemption, and sold it on his execution subject to the mortgage, and then the mortgagee released and quit-claimed his right in the land to the mortgagor, it was held that the original mortgagor became thereupon the assignee of the mortgage, and invested as to the land with the character of a mortgagee, and that a deed of release and quitclaim given by him to the purchaser of the equity of redemption at the execution sale vested the whole title to the land in the latter to the exclusion of the second attaching creditor.¹

§ 23. **Subrogation of an Assignee in Bankruptcy.** — Assignees in bankruptcy will, upon redeeming pledges made by the bankrupt, be subrogated to the rights of the pledgees, until the fund for general distribution is made good from the proceeds of the pledges redeemed.² And if a creditor of the bankrupt holding security for the payment of his debt proves it as an unsecured demand, and thereby waives his security, this will not extinguish the security for the benefit of other parties claiming the property subject to the rights of the creditor, but paramount to the title of the assignee; but the assignee will, for the benefit of the general fund, be subrogated to the security thus waived by the creditor.³ If the secured creditor proves his whole claim against the bankrupt's estate, and thus diminishes the dividend of the general creditors, they, or the assignee as their representative, will be subrogated to his rights under his security, and allowed to enforce the same against those whose rights were subject to his.⁴ A creditor who has proved his demand against the bankrupt estate of one who was under a subsidiary liability for the debt, though entitled to receive his dividend, may yet be compelled by the assignee either to proceed himself at law against the ultimate debtor, or to allow the assignee to do so in his name.⁵

¹ Bullard v. Hinckley, 5 Greenl. 507; Wallace v. Conrad, 3 N. B. R. (Me.) 272. 41.

² McLean v. Cadwalader, 15 N. B. R. 383.

⁴ Thayer, J., in Wallace v. Conrad, *supra*.

³ Hiscock v. Jaycox, 12 N. B. R.

⁵ Babcock, *in re*, 3 Story C. C. 393.

§ 24. **Subrogation of a Mortgagor against a Purchaser of the Equity who has assumed the Mortgage.** — Where the purchaser of an equity of redemption agrees with the mortgagor to assume and pay the mortgage-debt, if such purchaser fails to do so, and the mortgagor is himself compelled to pay it, he will be subrogated to the rights of the mortgagee against the mortgaged premises, and may enforce the mortgage upon them,¹ or he may look to the personal responsibility of the purchaser;² for, as between the mortgagor and such a purchaser from him, the debt rests upon the latter; and where one person pays a debt for another, being legally obliged to pay it, or having an interest in paying it, he is subrogated to all the rights of the creditor whom he has paid.³ So, according to the generally received doctrine, the mortgagee may himself enforce the performance of such an agreement by the purchaser.⁴ If the mortgagor in such a case, upon making the payment, obtains from the mortgagee a deed of release of the estate, he will, even at law, be regarded as the assignee of the mortgage.⁵ Where a mortgagee agreed with a mortgagor to look solely to the mortgaged premises for the payment of his debt, and to hold the mortgage-bond merely as evidence of the debt, but in violation of his agreement took judgment on a warrant of attorney which accompanied the bond, and collected the whole

¹ *Kinnear v. Lowell*, 34 Maine, 299; *Marsh v. Pike*, 10 Paige (N. Y.), 595; *McLean v. Towle*, 3 Sandf. Ch. (N. Y.) 117; *Stillman v. Stillman*, 21 N. J. Eq. 126; *Morris v. Oakford*, 9 Penn. St. 498; *Baker v. Terrell*, 8 Minn. 195; *Flagg v. Geltmacher*, 98 Ills. 293; *Risk v. Hoffman*, 69 Ind. 137; *Baldwin v. Thompson*, 6 La. 474.

² *Furnas v. Durgin*, 119 Mass. 500; *Braman v. Dowse*, 12 Cush. (Mass.) 227; *Pike v. Brown*, 7 Cush. (Mass.) 133; *Taintor v. Hemmingway*, 18 Hun (N. Y.), 458; *Dorr v. Peters*, 3 Edwards Ch. (N. Y.) 132; *Bolles v. Brach*, 22 N. J. Law, 680; *Whithed v. Pillsbury*, 13 N. B. R. 241.

³ *Curry v. Hale*, 15 W. Va. 867; *Comstock v. Drohan*, 71 N. Y. 9; *Ferris v. Crawford*, 2 Denio (N. Y.), 595; *Flagg v. Thurber*, 14 Barb. 196; *Baldwin v. Thompson*, 6 La. 474.

⁴ *Burr v. Beers*, 24 N. Y. 178; *Halsey v. Reed*, 9 Paige (N. Y.), 446; *Klapworth v. Dressler*, 13 N. J. Eq. 62; *Crowell v. Currier*, 27 N. J. Eq. 152 and (on appeal, *nom.* *Crowell v. St. Barnabas Hospital*) 650; *Schmucker v. Seibert*, 18 Kans. 104; *Tunnard v. Hill*, 10 La. Ann. 247; *Herbert v. Doussan*, 8 La. Ann. 267; *postea*, § 85.

⁵ *Kinnear v. Lowell*, 34 Maine, 299.

amount of the debt from the mortgagor personally, it was held that the mortgagor was, as against a second mortgagee from a later owner of the premises, entitled to be subrogated to the rights of the first mortgagee in the mortgaged premises.¹ If a purchaser from the mortgagor has agreed to assume and pay the mortgage-debt, such purchaser and the original mortgagor stand to each other in the relation of principal and surety; the latter is *quasi* surety for the former for the payment of the mortgage-debt.² The rule is the same if the payment, instead of being made by the mortgagor personally, is realized from the proceeds of collateral security deposited by him with the mortgagee.³ Each successive purchaser of the premises who assumes the payment of the mortgage becomes in his turn the party ultimately liable to bear the burden of the debt.⁴

§ 25. **Rights of Mortgagor against Mortgagee and such a Purchaser.** — When a purchaser of mortgaged premises has assumed the payment of the mortgage-debt, the mortgagor cannot require the creditor to foreclose, when there is no good reason why he should not himself pay his debt according to his agreement, and take an assignment of the bond and mortgage, and proceed against the land and the purchaser thereof for his indemnity. He can also proceed in equity, to compel the purchaser, as to whom he stands in the position of a mere surety, to pay the debt for his protection.⁵ But the mortgagee may, if he choose, rely upon the personal liability of his debtor; he is not bound to look after or to protect the mortgaged prem-

¹ *Conrad v. Mullison*, 24 N. J. Eq. 65. *Hoysradt v. Holland*, 50 N. H. 433; *Corbett v. Walerman*, 11 Iowa, 87.

² *Paine v. Jones*, 76 N. Y. 274; S. C. 14 Hun (N. Y.), 577; *Calvo v. Davies*, 73 N. Y. 211; S. C. 8 Hun (N. Y.), 222; *Marshall v. Davies*, 78 N. Y. 414; *Bentley v. Vanderheyden*, 35 N. Y. 677; *Ayres v. Dixon*, 78 N. Y. 318; *Cornell v. Prescott*, 2 Barb. (N. Y.) 16; *Flagg v. Thurber*, 14 Barb. (N. Y.) 196; *Blyer v. Mon-*

Ferris v. Crawford, 2 Denio (N. Y.), 595; *Brewer v. Staples*, 3 Sandf. Ch. (N. Y.) 579.

⁴ *McLean v. Towle*, 3 Sandf. Ch. (N. Y.) 117; *Wood v. Smith*, 51 Iowa, 156.

⁵ *Rubens v. Prindle*, 44 Barb. (N. Y.) 336. See *Resor v. McKenzie*, 2 Disney (Ohio), 210.

holland, 2 Sandf. Ch. (N. Y.) 478;

ises; and if he finally forecloses the mortgage, the mortgagor is entitled to credit only for the net proceeds realized therefrom, and remains liable for any deficiency.¹ The mortgagor would have been protected in payment of the debt by his right of subrogation to the mortgage, which, as between himself and his grantee, would not be extinguished by being transferred to him.² The mortgagor cannot be subrogated to the mortgage lien against his grantee, while a balance remains due upon the mortgage-debt to the holder of the mortgage.³

§ 26. **Subrogation of the Mortgagor against his Grantee subject to the Mortgage.**—The effect of a conveyance of mortgaged premises by the mortgagor, subject in terms to the incumbrance, though the payment of this is not assumed by the grantee, is to make the mortgaged premises, as between the mortgagor and the grantee, the primary fund for the payment of the mortgage-debt.⁴ And if the mortgagee with notice of the facts releases the land after such a conveyance, he thereby releases the liability of the mortgagor.⁵ The land is the primary fund for the payment of the mortgage-debt in the hands of a purchaser thereof who has retained the amount of the debt out of his purchase-money.⁶ If the mortgagor is afterwards obliged to pay the debt, he will be subrogated to the lien of the mortgage for his indemnity;⁷ but there will be no personal liability upon the grantee for its payment; the risk of the latter is limited to the estate in his hands.⁸ Such a purchaser cannot,

¹ *Marshall v. Davies*, 58 How. Pr. (N. Y.) 231.

² *Smith v. Ostermeyer*, 68 Ind. 432; *Stillman v. Stillman*, 21 N. J. Eq. 126.

³ *Massie v. Wilson*, 17 Iowa, 131.

⁴ *Sweetzer v. Jones*, 35 Vt. 317; *Hopkins v. Wolley*, 81 N. Y. 77; *Brewer v. Staples*, 3 Sandf. Ch. (N. Y.) 579; *Stevens v. Church*, 41 Conn. 369; *Townsend v. Ward*, 27 Conn. 610; *Colby v. Place*, 11 Nebraska, 343.

⁵ *Townsend Savings Bank v. Munson*, 47 Conn. 390.

⁶ *Manwaring v. Powell*, 40 Mich. 371.

⁷ *Moore's Appeal*, 88 Penn. St. 450; *Johnson v. Zink*, 52 Barb. (N. Y.) 396; S. C. affirmed on appeal, 51 N. Y. 333.

⁸ *Fiske v. Tolman*, 124 Mass. 254; *Taylor v. Mayer*, 93 Penn. St. 42; *Hubbard v. Ensign*, 46 Conn. 576; *Tichenor v. Dodd*, 3 Green (4 N. J. Eq.), 454; *Johnson v. Monell*, 13 Iowa, 300.

upon paying off the mortgage-debt, have the mortgage assigned to himself, and avail himself of it against his grantor, the original mortgagor.¹ Such a conveyance of the mortgaged premises, made to the mortgagee by the mortgagor's grantee, who had assumed the mortgage, will operate a merger of the mortgage and a payment of the debt secured thereby, so that no action can be maintained thereon against the mortgagor.² But if the grantor has warranted against the mortgage, or if it was agreed between the grantee and the grantor that the mortgage-debt should be paid by the grantor, the original debtor, then the grantee, if obliged to pay the incumbrance, may set it up against his grantor.³

§ 27. **Rights of Co-mortgagees against each other.** — Where a third mortgage was held by three, one of whom was also the holder of the first and second mortgages, and the latter began to foreclose the first mortgage, it was held that the other two might join in a bill against him to redeem from the first and second mortgages; and although he could not be compelled to contribute to the payment of these, yet, if he did not so contribute, and the two redeemed without him, they could hold the premises against him until he should contribute his share, being subrogated by their redemption to the same rights against him which before redemption he held against them.⁴ If a mortgagor has a demand against the mortgagee, which he has a right to set off against the notes secured by the mortgage, and these notes are in the hands of different assignees, the set-off should diminish the amount to be paid to each assignee ratably; and if one of them has extinguished the set-off, and the mortgaged estate is not sufficient to pay all, its proceeds should be so distributed that all shall contribute ratably to the extinguishment of the set-off, and receive ratable shares of the surplus.⁵

¹ *Atherton v. Toney*, 43 Ind. 211.

⁴ *Saunders v. Frost*, 5 Pick. (Mass.)

² *Dickason v. Williams*, 129 Mass. 259.

182.

⁵ *Campbell v. Johnson*, 4 Dana

³ *Estabrook v. Smith*, 6 Gray (Mass.), (Ky), 177.

572; *Wolbert v. Lucas*, 10 Penn. St. 73.

§ 28. **Subrogation of the Purchaser of an Equity of Redemption on his Payment of a Prior Incumbrance.** — The purchasers of an equity of redemption, which was subject to the incumbrance of four different liens, the payment of which they did not assume, having paid off the two first charges and a portion of the third, were held to be subrogated by their payments to the rights of the creditors under their respective liens, to the extent to which they had paid off the same, and were allowed to set them up against the holder of the fourth charge, on the principle that where one who is not personally liable for a debt secured by a mortgage or other lien is compelled to pay it in order to preserve his own property, and does pay it, the payment will be presumed to have been made for that purpose, and it is not necessary that the incumbrance should be assigned to him;¹ though, if he takes an assignment of it, this of course will only strengthen his position.² This right of subrogation will also pass to a grantee of such a purchaser.³ And where the holder of the first incumbrance waived his claim to actual payment for the sole benefit of one holding an interest in the equity of redemption, and discharged his mortgage of record to such person without consideration, it was held that the incumbrance was not thereby extinguished as to a subsequent incumbrancer, but the holder of the equity in whose favor the waiver was made was subrogated to its benefit, and could set it up as a subsisting title.⁴ If a party who has the right to require an assignment of a mortgage pays the mortgage-debt and takes a discharge of the mortgage, the mortgage will still be regarded as a subsisting security for his protection; he will be subrogated to the rights of the mortgagee.⁵ The rule that the payment of a mortgage-debt by the owner of the equity of

¹ *Walker v. King*, 45 Vt. 525; *Wilson v. Kimball*, 27 N. H. 300; *Bell v. Woodward*, 34 N. H. 90; *Peet v. Beers*, 4 Ind. 46; *Watts v. Symes*, 1 De G., Mac. & G. 240.

² *Davis v. Pierce*, 10 Minn. 376; *Dutton v. Ives*, 5 Mich. 515.

³ *Bell v. Woodward*, 34 N. H. 90.

⁴ *Spaulding v. Cranc*, 46 Vt. 292.

⁵ *Rigney v. Lovejoy*, 13 N. H. 252, *Parker, C. J.*; *Drew v. Rust*, 36 N. H. 335.

redemption is an extinguishment of the mortgage does not apply to the payment of an incumbrance which existed before the conveyance to the owner of the equity, and which the latter is under no obligation to pay.¹ This comes under the rule that if one having a right to redeem mortgaged premises pays the debt the mortgage is to be treated as assigned to him, if this is manifestly for his interest, and not inconsistent with the justice of the case, and where no contrary intent is clearly expressed or necessarily implied.² And he will be entitled to the benefit of a personal judgment already recovered against the mortgagor for the debt.³

§ 29. **Rights of such a Purchaser.** — It has been held in New Jersey that where the purchaser from a mortgagor pays off the mortgage and has it discharged, equity will not subrogate him to the rights of the mortgagee against an incumbrancer whose lien is subject to the mortgage, but prior to the purchase.⁴ If, however, the purchaser has paid off the mortgage in ignorance of the subsequent incumbrance, he could have it reinstated, and, in spite of its discharge, claim the benefit of subrogation to its lien.⁵ One who purchases property subject to the lien of three mortgages, the two first of which he pays out of his purchase-money and has discharged, the third mortgage having been given to the indorser of certain promissory notes to secure their payment by the mortgagor so as to save the mortgagee harmless by reason of his indorsement thereof, and then takes a discharge of the third mortgage from such indorser, the mortgagee therein, cannot be subrogated to the lien of the two prior incumbrances which he has paid against the holders of the notes which were secured by the third mortgage, although the discharge of the third mortgage

¹ *Abbott v. Kasson*, 72 Penn. St. 183; *Knox v. Easton*, 38 Ala. 345; *Ryer v. Gass*, 130 Mass. 227.

² *Ames, J.*, in *Ryer v. Gass*, *supra*, citing *Hinds v. Ballou*, 44 N. H. 619; *Leavitt v. Pratt*, 53 Maine, 147.

³ *Greenough v. Littler*, 15 Ch. Div. 93.

⁴ *Garwood v. Eldridge*, 2 N. J. Eq. (1 Green) 145.

⁵ *Young v. Morgan*, 89 Ills. 199; *Barnes v. Mott*, 64 N. Y. 397.

was in equity inefficacious against such holders ;¹ the only way in which he could have kept the prior liens alive against the parties interested in the third mortgage was by having them assigned to him.² The bare purchaser of an equity of redemption, in terms subject to the mortgage-debt, has no equity to be subrogated to the benefit of other securities held by the mortgagor for its payment ; having purchased the equity of redemption and nothing more, he acquires by his purchase no equitable control over such other securities.³ As between the original purchaser and such mortgagor the land is the primary fund for the payment of the mortgage-debt ;⁴ and if the mortgagor is compelled to pay it, he will be subrogated to the lien upon the land and entitled to reimbursement therefrom.⁵

§ 30. **Purchaser, if his Purchase avoided, subrogated to Lien which he has paid.** — The purchaser of real estate who, in order to save his property, has paid off a mortgage which was a valid lien thereon, is entitled to be subrogated to its lien as against those who turn out to have a title to the property superior to his own but subject to the incumbrance which he has discharged,⁶ though this has been denied at law in Massachusetts.⁷ Where the purchase-money paid for real estate, under a sale which is afterwards avoided, has been applied in the extinguishment of a mortgage which was valid against the estate in the hands of the owner thereof, such purchaser will be subrogated to the rights of the mortgagee to the extent of the purchase-money which has been so applied ; and the owner will not be allowed to avail himself of the payment made by a purchaser under a voidable sale and to recover the property free of the incumbrance, without making compensation to the purchaser to the extent of the payment which goes to the benefit

¹ *Postea*, §§ 154, 155, 187.

² *Boyd v. Parker*, 43 Md. 182.

³ *Stevens v. Church*, 41 Conn. 369.

⁴ *Antea*, § 26.

⁵ *Jumel v. Jumel*, 7 Paige (N. Y.), (Mass.) 289.

⁶ *Muir v. Berkshire*, 52 Ind. 149 ;

Webb v. Williams, Walker (Mich.),

544 ; *Valle v. Fleming*, 29 Mo. 152.

⁷ *Wade v. Howard*, 11 Pick.

of the owner.¹ If the purchaser of an equity of redemption has paid off the mortgage-debt, but has neglected to record his deed from the mortgagor, until after a creditor of the mortgagor has attached the equity of redemption, he will be subrogated to the lien of the mortgage upon the premises, for the reimbursement to him of the amount which he has paid upon the mortgage-debt.² But if the attachment had been made prior to the purchase, though actually unknown to the purchaser, such purchaser, having really bought subject to the attachment, could not, after the land had been sold upon the attachment, have the sale vacated, and set up against the attachment the lien of a paramount incumbrance, which he had paid out of his purchase-money.³ So the purchaser by parol of part of a mortgaged tract of land, who has paid off the mortgage to prevent a sale of the mortgaged estate, will be subrogated to the lien of the mortgage upon the whole tract and to the benefit of a judgment recovered thereon.⁴ The same rules will be applied to an incumbrance upon personal property.⁵

§ 31. **Purchaser under a Mortgage subrogated to its Lien.**— If mortgaged property has been sold under a decree of foreclosure, and the sale has been ratified and confirmed by the court which ordered it, but subsequently on appeal this decree is reversed, and the mortgaged property is ordered to be again sold for the payment of the mortgage debt, the original purchaser, if he has paid his purchase-money and it has been applied in payment of the mortgage-debt, is entitled to be subrogated to the position of the creditor,⁶ and to be treated as the assignee of the mortgage, to the extent of the payment of the debt which he has thus made.⁷ And if the mortgagee had himself purchased at such sale, and had accordingly

¹ *Fagg, J.*, in *Wade v. Baldmeir*, 40 Mo. 486, 488, explaining *Valle v. Fleming*, 29 Mo. 152.

² *Slocum v. Catlin*, 22 Vt. 137.

³ *Wade v. Baldmeir*, 40 Mo. 486.

⁴ *Champlin v. Williams*, 9 Penn. St. 341.

⁵ *Crescent City Ice Co. v. Stafford*, 3 Woods C. C. 94.

⁶ *Davis v. Roosevelt*, 53 Tex. 305.

⁷ *Johnson v. Robertson*, 34 Md. 165.

entered satisfaction upon his mortgage, the mortgage would, upon the sale being subsequently set aside, be set up again and enforced in equity.¹ If the proceeds of a sheriff's sale made upon existing mortgages have been applied in satisfaction of prior incumbrances, a subsequent mortgagee, who got nothing by reason of the insufficiency of the proceeds, cannot disregard the sale because the purchaser has failed to record his deed. Such a subsequent mortgagee would not, under any circumstances, be allowed to have the land resold without reimbursing the price of the former sale which had been applied upon the prior incumbrances.²

§ 32. **Rights of such a Purchaser in California.** — It was held in California, in a case in which a foreclosure sale had been avoided because the owner of the mortgaged premises had not been made a party to the foreclosure suit, that the purchaser at such sale must seek his relief from the consequences of the invalidity of the decree for the sale by proceedings in the foreclosure suit; because by his purchase he had submitted himself to the jurisdiction of the court in that suit as to all matters connected with the sale, and was entitled to call for such relief as the facts of the case might justify. Upon his application, the court might direct the sale to be set aside and the satisfaction of the mortgage to be cancelled, and authorize a supplemental bill for a resale of the premises to be filed, and conducted in the names of the original complainants for the benefit of the purchaser, and cause the grantee of the mortgagor and any other parties interested in the premises to be brought in as parties, or make such other orders as should protect the rights of all parties and mete out exact justice.³ In that State the purchaser of property at a judicial sale made under a decree for the foreclosure of a mortgage is not entitled, merely as such purchaser, to have the satisfaction of the judgment under which the sale was made set aside, and to be sub-

¹ *Zylstra v. Keith*, 2 Desaus. Eq. (So. Car.) 140.

² *Wolf v. Lowry*, 10 La. Ann. 272.

³ *Boggs v. Hargrave*, 16 Calif. 559.

rogated to the rights of the plaintiff in the judgment, simply because the sale at which he purchased was void, and he acquired no title thereby.¹

§ 33. **Instances of such Subrogation.** — Mortgaged land, upon the default of the mortgagor, was sold by the mortgagee to a purchaser, who afterwards conveyed the land to a second vendee with warranty. The mortgage-sale was afterwards declared void at the suit of the heirs of the mortgagor; and these heirs recovered the land from the second vendee. The second vendee then sued the heirs of the first purchaser upon the covenants in his deed, and recovered judgment against them, which they paid. The mortgagor's heirs then conveyed the land to one E, who conveyed it to one F, both E and F having notice of all these proceedings. The heirs of the first purchaser then brought suit against E and F, to have the land sold for the payment of the original mortgage-debt; and it was held that these plaintiffs were entitled to be regarded as the equitable assignees of the mortgage by subrogation to the rights of the mortgagee, the court saying, through *Biddle, C. J.*, that though subrogation is not allowed to voluntary purchasers or to strangers,² unless there is some peculiar equitable relation in the transaction, and never to mere volunteers, yet a person who has paid a debt under a colorable obligation to do so, and in order to protect his own claim, should be subrogated to the rights of the creditor, and that since subrogation is allowed for the benefit of a purchaser of an immovable, who uses the price which he pays in paying the creditors to whom the inheritance was mortgaged,³ this purchaser and his heirs should be subrogated to the rights of the mortgagee whose debt had been paid by his purchase.⁴ The same principle was applied in Michigan for the protection of one who had purchased mortgaged premises from the widow of the mortgagor, in consideration of his paying her a small sum

¹ *Branham v. San José*, 24 Calif.

585.

³ *Antea*, § 5.

⁴ *Muir v. Berkshire*, 52 Ind. 149.

² *Postea*, Ch. VIII.

of money and redeeming from the mortgage, when, after his redemption, the heirs of the mortgagor claimed the premises from him; and he was allowed against them a lien upon the land for the amount which he had paid to redeem it with interest, less the value of the use and occupation which he had enjoyed.¹

§ 34. **Purchaser ordinarily subrogated to all the Rights of his Vendor.** — A purchaser will ordinarily be subrogated to all the rights of his vendor in the property, even though they are not expressly conveyed to him.² Thus, one who has in good faith and for a valuable consideration purchased a portion of a mortgaged estate from the mortgagee in possession will be regarded as the equitable assignee of the mortgage to the extent of his purchase-money, both against the mortgagor seeking to redeem the estate,³ and against parties interested in the estate by subsequent conveyances.⁴ The vendee of one who holds a bond for title to land acquires by his purchase all the interest of his vendor, that is, the right to require a conveyance from the owner of the land upon payment of the price stipulated in the bond; and the owner of the land and the holder of the bond, having actual or constructive notice of his rights, cannot rescind their contract so as to deprive him of this equity.⁵ The assignee of one who held a contract for the purchase of land will be subrogated to the equitable lien of his assignor upon the land for the return of a portion of the purchase-money which he had advanced, upon the contract failing through the default or the inability of the vendor.⁶ The assignment of a judgment and of all instru-

¹ *Webb v. Williams, Walker* (Mass.), 526; *Wyman v. Hooper*, 2 (Mich.), 544.

² *McKeage v. Hanover Ins. Co.*, 81 N. Y. 39; *Sickles v. Flanagan*, 79 N. Y. 224; *Murphy v. Adams*, 71

Maine, 184; *Logan v. Taylor*, 20 Iowa, 297; *Creanor v. Creanor*, 36 Ark. 91; *Heinlen v. Martin*, 53 Calif. 321; *Peters v. Clements*, 52 Tex. 140.

³ *McSorley v. Larissa*, 100 Mass. 270; *Grover v. Thatcher*, 4 Gray (Mass.), 526; *Wyman v. Hooper*, 2 Gray (Mass.), 141; *Raymond v. Raymond*, 7 Cush. (Mass.) 605.

⁴ *Smith v. Hitchcock*, 130 Mass. 570.

⁵ *Shaver v. Shoemaker, Phillips Eq.* (Nor. Car.) 327; *Chickering v. Fullerton*, 90 Ills. 520.

⁶ *Tompkins v. Seeley*, 29 Barb. (N. Y.) 212.

ments taken in connection therewith vests in the assignee a bond given by the defendant to obtain the release of his property from an attachment that had been made in the suit.¹ The claim of a vendee of land for a defect in the title, a conveyance not yet having been made, will pass to his grantee. Thus, where the purchaser at a sale of land made under a decree of a court of equity paid a part of the purchase-money, and then, before taking a conveyance, sold his claim under his purchase to an assignee, who paid the residue of the price, and then a defect in the title was discovered, so that the assignee of the purchaser could not be forced against the objection which he made to take a conveyance, this assignee was held, upon the court's rescinding the contract of sale, to be entitled to have the whole amount that had been paid refunded to him, including the payment made by his grantor as well as what he had himself paid.² If the purchaser of real property at an execution-sale before taking his deed accepts from a stranger the amount on payment of which the judgment-debtor would have been entitled to redeem, and assigns him the certificate of the sale, the stranger is thereby subrogated to the rights of such purchaser and entitled to a deed of the property.³

§ 35. **Where the Purchaser pays Debts with which the Property was chargeable.** — The purchaser from a devisee whose purchase-money has been applied in payment of debts of the testator will be subrogated to the rights of the creditors whose demands he has thus satisfied.⁴ If the purchasers from the importers of dutiable goods have, upon the bankruptcy of the importers, paid the duties in order to obtain the goods, they will be subrogated to the priority of the United States for their reimbursement, even though they have proved their claim against the estate of the importers in bankruptcy as an unsecured one.⁵ But this right of purchasers to be subrogated

¹ *George v. Tate*, 102 U. S. 564.

⁴ *Gibson v. McCormick*, 10 Gill

² *Smith v. Brittain*, 3 Ired. Eq. & J. (Md.) 65.
(Nor. Car.) 347.

⁵ *Kirkland, in re*, 14 N. B. R.

³ *Eleventh Avenue, in re*, 81 N. Y. 139.

to the benefit of debts which have been paid by themselves or out of their purchase-money is limited to debts which constitute a prior charge upon the property which they have purchased. If they have voluntarily paid debts which could not have been enforced against them or against the property in their hands, if, for example, the purchasers at a foreclosure-sale have voluntarily paid off a junior mortgage upon the property, they will have no right of subrogation to its lien.¹

§ 36. **Purchaser compelled to pay his Vendor's Debt subrogated to Creditor's Rights against his Vendor.**—If the purchaser of land is compelled, in order to save the property which he has purchased, to pay a debt which ought to have been paid by his vendor, he will be subrogated to the benefit of the debt, and of any charge therefor upon the property of the vendor. And in at least one case this equitable right of the purchaser has been preferred to the claim of a surety of the vendor for the debt which constituted the charge upon the land to be subrogated, upon his payment of the debt, to the security which was held by the creditor.² A purchaser whose land has been taken upon an execution against his vendor is entitled, upon paying the debt, to be subrogated to the lien of the judgment against the remaining land of his vendor.³ If, however, he has paid for the land by giving bonds for its price, which are still unpaid, he may set off his payment against these bonds, even though they are in the hands of one to whom they have been assigned by the vendor;⁴ so, too, he may set off such a payment against notes which he has given for the price of the land, while these notes are still retained by the vendor, even though the notes are by statute exempted from levy in the hands of the vendor, like a homestead estate.⁵ But this set-off of such a payment by the pur-

¹ *Carpenter v. Brenham*, 40 Calif. 221.

² *Rush v. State*, 20 Ind. 432.

³ *McGill, in re*, 6 Penn. St. 504.

⁴ *Armentrout v. Gibbons*, 30 Gratt. (Va.) 632; *McGill, in re*, 6 Penn. St. 504.

⁵ *Corbally v. Hughes*, 59 Ga. 493.

chaser against bonds given by him for the price of the land must be made first upon bonds which are retained by the vendor, before applying it upon those bonds which have been assigned by him ; and if the purchaser, with knowledge of the assignment of some of the bonds and with notice of the prior lien upon his land, pays the unassigned bonds to the amount of the lien, the assigned bonds will be thereby relieved from all liability on account of the lien.¹

§ 37. **Limitation of Purchaser's Right of Subrogation.**—The purchaser of a tract of land will not be subrogated by operation of law to the right of his vendor against the original owner, from whom the latter derived his title, by reason of a deficiency in the quantity of the land which would have entitled the vendor to an action against the original owner for such deficiency. An express or conventional subrogation is necessary to vest this right of the vendor in his purchaser.² Nor will the purchaser be subrogated to any right of his vendor which is excluded by necessary implication from the terms of the conveyance under which he claims. Where the vendor of land had a lien thereon for the price, which was superior to a mortgage subsequently given by the vendee, but sold the vendee's interest in the property, instead of the property itself, on a judgment which he obtained for the unpaid balance of the price, the purchaser of the vendee's interest at this sale was not allowed to prevent a foreclosure of the mortgage on the ground that he was by his purchase from the vendor subrogated to the vendor's equitable lien.³ The purchaser, under an execution against the mortgagor, of the right to redeem from two mortgages, since he acquires only the interest of the mortgagor, cannot, upon taking an assignment of the first mortgage, set it up as a source of title against those who claim under the second mortgage.⁴

¹ *Armentrout v. Gibbons*, 30 Gratt. (Va.) 632.

² *Allen v. Phelps*, 4 Calif. 256.

³ *Chambliss v. Miller*, 15 La. Ann. 713; *Davis v. Clark*, 33 N. J. Eq. 579.

⁴ *Parker, C. J.*, in *Wade v. Howard*, 6 Pick. (Mass.) 492.

§ 38. **Subrogation of the Purchaser at an Execution-sale against the Debtor.**—If the proceeds of property irregularly sold at a sheriff's sale have been applied in payment of the owner's debts, he cannot recover the property from the purchaser without repaying to him the amount of these proceeds.¹ So, where a judgment-debtor owned a lot of land, and the sheriff, on an execution against him, sold by mistake another lot to which the debtor had no title, and the purchase-money was paid and applied upon the judgment, and the debtor surrendered his lot to the purchaser, both supposing it to be the one that had been sold upon the execution, but afterwards the debtor, discovering the mistake, regained possession, claimed the land, and refused to refund the purchase-money, the purchaser was allowed to recover the amount of the purchase-money from him.² The purchaser at an execution-sale of property which is under attachment for the same debt is entitled, if it is afterwards subjected by a decree to the payment of the attachment, to be reimbursed out of the proceeds of the attached property for his payment upon the execution.³ And if the purchaser of attached property, even though he purchased from the defendant after the suit was brought, pays the price in discharge of executions which were existing liens upon the property at the time of the attachment, he should be indemnified, if the property is afterwards decreed to be sold upon the attachment, by the reimbursement of his money in preference to the attaching creditor.⁴ So, also, if an execution-creditor takes from his debtor an assignment of the latter's interest in a personal estate, this assignment is valid to the amount of his demand; and if this creditor, to save his rights, afterwards purchases the same property from a sheriff, who sells it upon a subsequent levy made under executions senior to his own, though this latter sale is void, the creditor

¹ *Dufour v. Campana*, 11 Martin (La.), 607; *Burns v. Ledbetter*, 54 Tex. 374. ³ *Beall v. Barclay*, 10 B. Mon. (Ky.) 261.

² *McLean v. Martin*, 45 Mo. 393. ⁴ *Beall v. Barclay*, 10 B. Mon. (Ky.) 261.

so purchasing will be allowed, as against the debtor, to stand in the place of the senior creditors whom he has thus satisfied, and to be subrogated to their rights.¹ And generally where an execution-sale upon a valid judgment is voidable, and the debtor brings suit to recover the property, if there be no fraud on the part of the purchaser, the latter will not be compelled to restore the property to the debtor without being reimbursed the amount which he paid, and which has gone to discharge the judgment.² And in the same way the purchaser from a judgment-debtor of property which has been sold on execution will be subrogated to whatever right of redemption the debtor has by agreement acquired in the premises.³

§ 39. **Subrogation of such Purchaser where the Property recovered by Third Parties.** — It has been considered that the purchaser of property sold under an execution has the right in equity, if the property has been recovered from him or his vendor by another under a superior title, to be substituted for the judgment-creditor, and to have the amount of his purchase-money refunded to him by the defendant in the execution, even though he knew at the time of his purchase that the property belonged to another, and was not liable to be sold on the execution ;⁴ and that if the property had been thus recovered from a vendee of the purchaser, the purchaser, in his suit for indemnity, need not show that he has reimbursed his vendee, to whom he only, and not the defendant in the execution, is liable.⁵ But this has also been strenuously denied, and the position maintained, with perhaps a greater show of reason, that the purchaser at an execution-sale is not subrogated to the rights of the judgment-creditor against the debtor, if the property is afterwards taken from him by virtue of a paramount title in a stranger, on the ground that he is merely a voluntary purchaser of the debtor's interest in the property, and that it is only

¹ Bentley v. Long, 1 Strohh. Eq. (So. Car.) 43.

² Howard v. North, 5 Tex. 290.

³ Dupuy v. McMillan, 2 Duvall (Ky.), 555.

⁴ McLaughlin v. McDaniel, 8 Dana (Ky.), 182; *semble*, in Howard v. North, 5 Tex. 315.

⁵ McLaughlin v. McDaniel, 8 Dana (Ky.), 182.

where the person paying a debt stands in the position of a surety, or is compelled to pay it by virtue of legal process, or in order to save his own property, that equity substitutes him, even against the debtor, to the place of the creditor; and that a mere stranger or volunteer paying the debt will not be subrogated to the rights of the creditor, unless there has been an assignment to him or an express agreement for such subrogation.¹

§ 40. **Rights of a Purchaser whose Purchase is voidable by the Creditors of his Vendor.** — One who has purchased property under such circumstances as to authorize the creditors of the vendor to avoid the sale, whether he is an assignee for the benefit of creditors, a purchaser, or a voluntary grantee, will, after satisfying the claims of the attaching creditors, be subrogated to their rights, so as to enable him to hold the property against subsequent attachments.² And if the sale to him was good as against the vendor, so that he would have the right to require the vendor himself to discharge the debts for which attachments were subsequently levied on the property, he may, in New York, upon paying the judgment rendered under such attachment, require the judgment against his vendor to be assigned to himself, and be subrogated to the rights of the judgment-creditor against his vendor.³ If a grantee of land whose deed is voidable by the creditors of his grantor takes from a prior mortgagee of the property a quitclaim deed of all the latter's interest in the premises, though it expressly states that the mortgage is thereby cancelled and discharged, this will, if his grant is avoided by the grantor's creditors, be construed against them to operate as an assignment and not as a discharge of the mortgage;⁴ his right of subrogation is not destroyed by the avoidance by his grantor's creditors of the conveyance which he has taken.⁵

¹ *Richmond v. Marston*, 15 Ind. 134; *Childress v. Allen*, 3 La. 477.

² *Selleck v. Phelps*, 11 Wisc. 380.

³ *Malcolm v. Cole*, 66 N. Y. 363.

⁴ *Crosby v. Taylor*, 15 Gray (Mass.), 64.

⁵ *Tompkins v. Sprout*, 55 Calif. 31; *Merrell v. Johnson*, 96 Ills. 224.

§ 41. **Waiver of the Right of Subrogation.** — The right of subrogation may of course be waived by the party entitled to it. Thus, where the estates of two were subject to a common mortgage, and one of them paid off the whole debt and took an assignment of the mortgage, it was held that he might either regard the mortgage as discharged, and bring an action against the other for contribution, or treat it as a subsisting charge upon the estate until the other should redeem by paying a reasonable contribution.¹ It appearing that mortgaged premises were subject to the paramount lien of certain taxes, the first mortgagee, being about to foreclose, paid the same, under an agreement with the second mortgagee that the latter, if he purchased the premises at the foreclosure-sale, should repay the amount. The second mortgagee did so purchase; and the estate was conveyed to him. He then refused to refund the taxes; and it was held that the first mortgagee could not now, after his conveyance, be subrogated to the original lien of the taxes.² Though in general a junior incumbrancer who pays off the holder of a prior lien is entitled to be subrogated to the benefit of the latter's security, yet this right will be waived by an agreement of the junior incumbrancer that the property shall be otherwise appropriated.³ An unexplained delay for eleven years will be fatal to a claim of subrogation.⁴

§ 42. **What is not a Waiver.** — A mortgagee who is entitled to be subrogated to the benefit of a prior lien upon the premises which he has discharged will not be deprived of the advantage of this right, even though he has taken a new mortgage upon the same premises for the amount of his payment,⁵ and this new mortgage has been afterwards adjudged to be void for

¹ Taylor v. Bassett, 3 N. H. 294.

² Manning v. Tuthill, 30 N. J. Eq. 29.

³ United States Bank v. Peters, 13 Peters, 123.

⁴ Buffington v. Barnard, 90 Penn. St. 63.

⁵ Worcester Bank v. Cheeney, 87 Ills. 602; Burchard v. Phillips, 11 Paige (N. Y.), 66; Eagle Ins. Co. v. Pell, 2 Edw. Ch. (N. Y.) 631.

usury.¹ But it is to be observed that this agreement for usury was not made until after the right of subrogation had vested; if, however, the claim had grown out of the usurious agreement, instead of being prior to it and independent of it, it could have furnished no basis for subrogation.² Where one who was in treaty for the purchase of personal property, which was subject to two mortgages, paid off the first mortgage, under an agreement that until the completion of the sale he should stand in the place of the mortgagee and have the benefit of his security, it was held that he was not deprived of this conventional subrogation by the fact that his agreement with his vendor contained a recital that the amount so paid by him had been paid by him out of the purchase-money and in discharge of the mortgage-debt.³

§ 43. **Right lost by Negligence resulting in Prejudice to others.**—The fact that the loss of one who seeks to be protected by the application of the doctrine of subrogation arose from his own negligence, and that the granting of his request would now be prejudicial to other innocent creditors or assignees of his debtor, will be fatal to his claim.⁴ Thus, where the owner of land conveyed it to another, and took his notes for the purchase-money secured by a mortgage upon the property, and the parties agreed that the deeds should remain unrecorded until another survey of the land should be made, and the mortgagor stated to the mortgagee that he intended to sell the land to one D, and promised to transfer D's notes and mortgage instead of his own, to which arrangement the mortgagee assented, and the mortgagor did convey to D, who recorded his deed without notice of the prior mortgage, which was not recorded until after the conveyance to D, it was held that the original mortgagee was not entitled to the benefit of the mortgage

¹ *Patterson v. Birdsall*, 64 N. Y. Barb. (N. Y.) 613, *per Welles, J.*; 294, affirming S. C. 6 Hun (N. Y.), *postea*, § 44.
632.

² *Farmers' Loan Co. v. Carroll*, 5 240.

³ *Watts v. Symes*, 1 De G., M. & G.

⁴ *Conner v. Welch*, 51 Wisc. 431.

given by D, in preference to the other creditors of his debtor's insolvent estate.¹ And where a grantor sold land, and took no security for the payment of the purchase-money upon his conveyance, and his grantee sold the land to another, and took in payment divers bonds for the purchase-money, it was held that although the original grantor, by virtue of his equitable lien upon the land, might have subjected these bonds to the payment of his claim while they were in the hands of his grantee, yet he lost this right by delaying to take any steps to enforce it until after the bonds had been assigned to *bonâ fide* holders for value without notice of his claim.² But the mere fact that the loss of the party seeking to be subrogated arose from his own negligence will not debar him from the right, unless its enforcement would be prejudicial to others who are not at fault.³

§ 44. **The Party seeking Subrogation must not be in his own Wrong.**—Any one who seeks to be protected by the application of the equitable doctrine of subrogation must come into court with clean hands.⁴ Since the doctrine of subrogation will not be applied to relieve a vendee from the consequences of his own wrongful act, a vendor who seeks to rescind the contract of sale and to recover the property by reason of the fraud of the vendee will not be obliged to reimburse the fraudulent vendee for his expenditures made to carry out the fraud, although upon recovering the property he will reap the benefit of these expenditures by the discharge of a lien upon the property which they have paid.⁵ Where the second mortgagees of a railroad company purchased the road under an execution against the company, formed themselves into a new corporation, and as such operated the road for their own benefit, and then the new corporation, to prevent a sale

¹ *Bussey v. Page*, 13 Maine, 459. *Wallace*, 517; *Griffith v. Townley*, 69

² *Moore v. Holcombe*, 3 Leigh Mo. 13; *Farmers' Loan Co. v. Carroll*, 5 Barb. (N. Y.) 613.

³ *Wall v. Mason*, 102 Mass. 313.

⁵ *Guckenheimer v. Angevine*, 81

⁴ *Wilkinson v. Babbitt*, 4 Dillon N. Y. 394.
C. C. 207; *Railroad Co. v. Soutter*, 13

of the road on foreclosure, paid the debt secured by the first mortgage, after which their own purchase of the road, at the suit of creditors of the old company, was set aside as fraudulent and void, it was held that the new corporation could neither recover back the amount it had paid to the first mortgagees, nor yet be subrogated to their rights under their first mortgage.¹ If a creditor who might otherwise claim to be subrogated to the lien of a mortgage upon his debtor's property which he has paid off has taken for his security another mortgage from the debtor upon the same property, which is found to be fraudulent and void as against the debtor's other creditors, he will not be allowed such subrogation to the prejudice of parties who have purchased the property at an execution-sale against the debtor.²

§ 45. **When one entitled to be subrogated to a Lien may demand an Assignment thereof.**—The right of subrogation to the benefit of a prior incumbrance is sometimes enforced by a court of equity by compelling the holder of it to assign it to the party entitled to be subrogated thereto.³ But the mere right of redemption, and thereupon of subrogation, will not of itself entitle a party to require an assignment, although this has been maintained in some cases.⁴ The right to demand an assignment is now generally limited to cases in which the party who is in a position, or has an interest, which entitles him to redeem and thereupon to be subrogated to the benefit of the lien from which he redeems, is also in effect a surety, or is in equity to be regarded as a surety, for the payment of the debt secured thereby.⁵ “Any one having a subsequent incum-

¹ *Railroad Co. v. Soutter*, 13 Wallace, 517.

² *Wiley v. Boyd*, 38 Ala. 625.

³ *Johnson v. Zink*, 52 Barb. (N. Y.) 396; *S. C.*, on appeal, 51 N. Y. 333; *Mount v. Suydam*, 4 Sandford Ch. (N. Y.) 399; *Lyons' Appeal*, 61 Penn. St. 15; *Raffety v. King*, 1 Keene, 601.

⁴ *Sutherland, J.*, in *Ellsworth v.*

Lockwood, 42 N. Y. 89, 97, citing and criticising *Pardee v. Van Anken*, 3 Barb. (N. Y.) 536, 537, and *Jenkins v. Continental Ins. Co.*, 12 How. Pr. (N. Y.) 66.

⁵ *Bigelow v. Cassedy*, 26 N. J. Eq. 557; *Speiglemeyer v. Crawford*, 6 Paige (N. Y.), 257; *Cherry v. Monro*, 2 Barb. Ch. (N. Y.) 618; *Averill v.*

brance upon the mortgaged estate can protect his interest by paying the prior mortgage when it is due; and he thereupon succeeds by subrogation, upon settled principles of equity, to the rights and interest of such prior mortgagee in the lands, as security for the amount so paid, without any assignment or transfer by the prior mortgagee. He is not entitled to an assignment."¹ But the right to an assignment has since been maintained in New York.² Where one is entitled to an assignment of a prior mortgage, he must actually tender the full amount of principal, interest, and any accrued costs to the mortgagee; merely saying what he will do and paying the money into court will not stop the running of interest on the mortgage-debt.³ And in Massachusetts the right of any parties junior in interest to compel the assignment to them of a prior mortgage is utterly denied.⁴ "The mortgagee," says Mr. Justice Colt, "is not required to observe or to regard the equitable rights to contribution which may exist between parties having different interests in the equity, or to protect them by transferring his title to any one. When such rights exist, they are protected on those settled principles of equity by which one who assumes more than his share of the common burden is subrogated to the rights of the mortgagee, to hold, without any assignment or act of transfer, as *quasi* assignee, for the purpose of compelling contribution. He becomes in effect the assignee of the mortgage, for the purpose of enabling him to compel a contribution. But the right of subrogation arises by operation of law only when there has been a payment and extinguishment of the mortgage by one entitled to redeem. An

Taylor, 8 N. Y. 44; Johnson v. Zink, 52 Barb. (N. Y.) 396; S. C., on appeal, 51 N. Y. 333; Vandercook v. Cohoes Savings Institution, 5 Hun (N. Y.), 641; Ellsworth v. Lockwood, 42 N. Y. 89.

¹ Jones on Mortgages, § 792, citing Ellsworth v. Lockwood, 42 N. Y. 89, 96; Burnet v. Denniston, 5 Johns.

Ch. (N. Y.) 35; Hubbard v. Ascutney Mill Dam Co., 20 Vt. 402.

² Twombly v. Cassidy, 82 N. Y. 155.

³ Hornby v. Cramer, 12 How. Pr. (N. Y.) 490.

⁴ Butler v. Taylor, 5 Gray (Mass.), 455; Lamson v. Drake, 105 Mass. 564; Lamb v. Montague, 112 Mass. 352.

assignment implies the continued existence of the debt, and the equitable right does not arise."¹

§ 46. **The Real Debtor cannot be subrogated.** — The debtor upon whom rests the ultimate obligation of discharging the debt cannot by his payment acquire any right of subrogation;² and if, upon making his payment, he takes an assignment of the security, this will be equivalent to a discharge thereof.³ Thus, one who has given two mortgages upon the same land with covenants of warranty cannot, after the titles under the two mortgages have been united in one person and the second mortgage has been foreclosed, by redeeming from the first mortgage, claim to be an equitable assignee thereof, and to be subrogated to the rights of the first mortgagee, so as to enable him to open the foreclosure of the second mortgage.⁴ A purchaser cannot be subrogated to the benefit of an incumbrance which he has agreed to pay.⁵ So, if the purchaser of land which is incumbered first by a mechanic's lien and then by a mortgage has assumed and agreed to pay the mortgage-debt, his purchase of the land when sold under a judgment recovered upon the mechanic's lien will give neither to him nor to his grantee any title that can be set up against the mortgage.⁶ The purchaser of an equity of redemption is entitled to the benefit of a payment made by any one whose duty, as to him, it is to pay the mortgage-debt.⁷ But the mere fact that the money paid to a mortgagee comes from the debtor will not necessarily operate a discharge of the mortgage, if that is, as a part of the same transaction, assigned to a third party for value.⁸

¹ *Lamb v. Montague*, 112 Mass. 353, citing, besides cases already referred to, *Gibson v. Crehore*, 5 Pick. (Mass.) 146, 152; *McCabe v. Bellows*, 7 Gray (Mass.), 148; *Robinson v. Leavitt*, 7 N. H. 73, 100.

² *Thompson v. Heywood*, 129 Mass. 401; *Walsh v. Wilson*, 130 Mass. 124.

³ *Carlton v. Jackson*, 121 Mass. 592.

⁴ *Butler v. Seward*, 10 Allen (Mass.), 466.

⁵ *Willson v. Burton*, 52 Vt. 394.

⁶ *Heim v. Vogel*, 69 Mo. 529.

⁷ *Williams v. Thurlow*, 31 Maine, 392.

⁸ *Sheddy v. Geran*, 113 Mass. 378; *Howe v. Woodruff*, 12 Ind. 214.

§ 47. **Assignment to one who is bound to pay the Debt tantamount to a Discharge.** — Just as an assignment is not necessary where the right of subrogation exists,¹ so it is held that where one who has the right to redeem property from a mortgage or other charge pays the amount due and takes an assignment of the security, this will be treated as thereby discharged or as still subsisting, as the justice of the case may require.² Thus, an assignment of a mortgage to a former owner of the equity of redemption, who has conveyed the mortgaged premises with warranty, extinguishes the lien of the mortgage; the assignee takes it for the benefit of his grantee with warranty, and the assignment to him is tantamount to a discharge.³ So, if a purchaser of mortgaged premises who has by his deed assumed payment of the mortgage-debt, or the grantee of such a purchaser, takes an assignment of the mortgage, this assignment operates a discharge, and the lien of the mortgage is gone.⁴ If the purchaser of mortgaged property, who has agreed with his grantor to assume and pay the mortgage as a part of his purchase-money, causes the conveyance of the property to be made to a third party instead of taking it to himself, and then procures the mortgage to be assigned to himself instead of having it discharged, this will as to the vendor operate an extinguishment of the mortgage.⁵ So also one for whom property is held in trust, and whose equitable duty it is to pay a mortgage upon the property, though he may not be legally bound therefor, cannot, after paying the mortgage-debt, keep the mortgage alive by procuring it to be assigned to himself, or to a third person for his benefit; his payment dis-

¹ *Antea*, § 45.

² *Bailey v. Willard*, 8 N. H. 429; *McGIVEN v. Wheelock*, 7 Barb. (N. Y.) 22; *Walker v. Stone*, 20 Md. 195.

³ *Mickles v. Townsend*, 18 N. Y. 575; *Mickles v. Dillaye*, 15 Hun (N. Y.), 296; *Wadsworth v. Williams*, 100 Mass. 126.

⁴ *Russell v. Pistor*, 7 N. Y. 171; *Kilborn v. Robbins*, 8 Allen (Mass.), 466; *Hoysradt v. Holland*, 50 N. H. 433; *Jerome v. Seymour*, Harringt. (Mich.) 357; *Perry v. Wright*, 5 Russ. 142.

⁵ *Frey v. Vanderhoof*, 15 Wisc. 397.

charges the mortgage.¹ By an arrangement between two mortgagors, one of them assumed the payment of the whole debt, and gave to the mortgagee a new mortgage upon the same and other property, to secure both the old debt and a new indebtedness of his own, the former joint mortgage being also retained by the creditor as collateral security. A purchaser of the property covered by the new mortgage then paid off the latter security, and took an assignment of the old joint mortgage; and this transaction was held to operate a discharge of the old mortgage.²

§ 48. **Subrogation of a Dowress who has paid a Paramount Lien on the Property.** — A widow who was entitled to dower, but had not yet procured it to be assigned to her, remained in the mansion-house of her deceased husband with her infant children, whom she supported. She then paid a balance of the purchase-money which remained due upon the property, and which was secured by a vendor's lien thereon; and she also paid out money for the taxes upon the property and for improvements: and it was held that she was entitled to be subrogated to the liens upon the property which existed respectively for the purchase-money and for the taxes which she had paid, except that part thereof which it was her duty as dowress to pay, but that she could not hold the land for the reimbursement to her of what she had spent in making improvements.³ She is entitled to be subrogated to a lien which she has paid off, in order to preserve the property in which she thus has an interest.⁴

§ 49. **Widow's Right of Dower against a Purchaser who has paid an Incumbrance to which her Dower was subject.** — As the purchaser of an equity of redemption may be subrogated to the lien of prior incumbrances which he has paid in order to preserve his property, without having been under any personal

¹ Putnam v. Collamore, 120 Mass. 454.

² Simmons v. Lyle, 32 Gratt. (Va.) 752.

³ McGiven v. Wheelock, 7 Barb. (N. Y.) 22.

⁴ Stinson v. Anderson, 96 Ills. 373.

obligation to provide for their payment,¹ so, *a fortiori*, if such a purchaser takes an assignment of a previous mortgage, such an assignment will not operate an extinguishment of the lien of the mortgage.² And if the mortgagor's widow was entitled to dower or homestead as against such purchaser, but not as against the mortgagee, then, after such an assignment from the latter to the former, she cannot have her dower or her homestead, without redeeming from the mortgage, which, however, she will have the right to do.³ A quitclaim deed of the mortgaged premises from the mortgagee to such a purchaser, after a breach of the condition of the mortgage, is a sufficient assignment of the mortgage.⁴ The mortgage will be kept alive where this is manifestly for the interest of the party who has paid it, and is consistent with the justice of the case, if no contrary intent is expressed or manifestly implied;⁵ in other words, the mortgage will be kept alive for the benefit of one who has paid it, where he is evidently entitled in equity to be subrogated to it, and does not appear to have done anything to waive the right. But if the purchaser has simply paid off the mortgage and had it discharged, not having taken an assignment of it, or in any way indicated an intention to avail himself of its lien, he cannot set it up against the claim of the mortgagor's widow for dower.⁶ The release of dower in a mortgage-deed works an estoppel, not only in favor of the mortgagee and the direct assignees of the mortgage, but also of those who by equitable substitution become entitled to its benefits.⁷ The dower rights of the mortgagor's widow, having been released in the mortgage, though valid against the purchaser of the equity, must remain subject to the mortgage after this has

¹ *Antea*, §§ 13, 28.

² *Simonton v. Gray*, 34 Maine, 50.

³ *Lamb v. Montague*, 112 Mass. 352; *Gibson v. Crehore*, 3 Pick. (Mass.) 475; S. C. 5 Pick. (Mass.) 146; *Carll v. Butman*, 7 Greenl. (Me.) 102; *Simonton v. Gray*, 34 Maine, 50; *Hinds v. Ballou*, 44 N. H. 619; *Woodhull v. Reid*, 1 Harrison (N. J.), 128.

⁴ *Savage v. Hall*, 12 Gray (Mass.),

363; *Hinds v. Ballou*, 44 N. H. 619; *Carll v. Butman*, 7 Greenl. (Me.) 102.

⁵ *Hinds v. Ballou*, 44 N. H. 619.

⁶ *Atkinson v. Angert*, 46 Mo. 515.

⁷ *Dearborn v. Taylor*, 18 N. H. 153; *McMahon v. Russell*, 17 Fla. 698; *Walker v. Walker*, 5 Ills. App. 289.

been assigned or quitclaimed to the purchaser.¹ And a redemption from the mortgage through process of law by such a purchaser will give him the same right.² If a new mortgage has been given by such a purchaser expressly as a substitute for the old mortgage, the widow's rights will be no greater against the holder of the new mortgage, or against one who has redeemed from it, than they were against those claiming under the old mortgage.³ But where a husband, by falsely representing, without his wife's knowledge, that he was unmarried, obtained a loan on a mortgage in which she did not join, and therewith paid off prior liens upon the premises, the mortgagee's estate was not allowed to override her inchoate rights of dower;⁴ for the wife is not in privity with her husband in regard to transactions to which she is not a party.⁵ The mortgagor's assignee in insolvency is to be regarded as a purchaser who is not bound to pay the mortgage-debt; and an assignment of the mortgage to him will not extinguish it for the benefit of the mortgagor's widow.⁶ The same rules apply to a purchase of the equity of redemption by the mortgagee as to an assignment or quitclaim of the mortgage to a purchaser of the equity, as to its effect upon the rights of the mortgagor's widow.⁷ The mortgage will not be regarded as extinguished, so as to let in the widow's claim of dower, which was released in the mortgage, unless the debt has been paid by her husband, the mortgagor, or from his means, or by some one who stands in such relation to him as to be in legal effect the debtor, whose duty it is to pay and discharge the mortgage-debt.⁸

¹ Harrow v. Johnson, 3 Met. (Ky.) 578.

² Niles v. Nye, 13 Met. (Mass.) 135.

³ Newton v. Cook, 4 Gray (Mass.), 46.

⁴ Westfall v. Hintze, 7 Abbott New Cas. (N. Y.) 236.

⁵ Tibbetts v. Langley Manufg. Co., 12 So. Car. 465.

⁶ Sargeant v. Fuller, 105 Mass. 119; Brown v. Lapham, 3 Cush. (Mass.) 551.

⁷ Campbell v. Knights, 24 Maine, 332; Snyder v. Snyder, 6 Mich. 470; Thompson v. Boyd, 1 Zab. (N. J.) 58.

⁸ Shaw, C. J., in Brown v. Lapham, 3 Cush. (Mass.) 551.

§ 50. **Dower let in if Debt paid by one bound to pay it.**—If, however, the mortgage-debt has been paid by one bound to pay it, then the mortgage will be regarded as extinguished, whether or not it has been assigned to the party making the payment.¹ Whether any particular transaction shall be held to operate in legal effect as a payment which extinguishes the lien, or as an assignment, which preserves and keeps it on foot, does not depend so much upon the form of words used as upon the relations subsisting between the parties advancing the money and the party executing the transfer or release, and their relative duties. If the money is advanced by one whose duty it is, by contract or otherwise, to pay and cancel the mortgage, and relieve the mortgaged premises from the lien of the mortgage, a duty in the proper performance of which others have an interest, it will be held to be a release and not an assignment, although in form it purports to be an assignment.² If the payment be made by an heir-at-law of the mortgagor, pursuant to the terms of a bond given by him to the administrator to pay the debts of the deceased, in order to prevent his real estate from being sold therefor, this payment will extinguish the mortgage in favor of the widow's claim to dower.³ If the debt secured by the mortgage has in substance been paid from the means or estate of the principal debtor, this will let in the widow's claim to dower, which was barred by the mortgage.⁴

§ 51. **The Widow may redeem. Her Rights thereupon.**—A widow who is entitled to dower in an equity of redemption may redeem the estate by paying off the whole of the mortgage-debt;⁵ and upon so doing she will be subrogated to the place of the mortgagee for her protection and indemnity, until the

¹ *Antea*, § 47; *McCabe v. Swap*, 14 Allen (Mass.), 188; *Norris v. Morrison*, 45 N. H. 490; *Collins v. Torrey*, 7 Johns. (N. Y.) 278; *Atkinson v. Stewart*, 46 Mo. 510.

² *Shaw, C. J.*, in *Brown v. Lap-ham*, 3 Cush. (Mass.) 551.

³ *King v. King*, 100 Mass. 224.

⁴ *Atkinson v. Stewart*, 46 Mo. 510.

⁵ *McCabe v. Bellows*, 7 Gray (Mass.), 148.

heirs shall reimburse her their equitable proportion, and thus entitle themselves to all that is not comprehended in her claim of dower.¹ When another claiming, like herself, under the mortgagor, redeems the mortgaged estate, she will be let in to share in the benefit of the redemption, upon paying her equitable proportion of the mortgage-debt, according to the value of her dower interest;² or she may be assigned her dower in the excess of the value of the estate over the amount of the mortgage-debt.³ And where the wife has joined with her husband in a mortgage of both his land and his personal property, she has, after the death of her husband, an equitable right to have the mortgaged personalty first applied to the payment of the mortgage-debt, both against the mortgagee and also against the general creditors of her husband's estate;⁴ if she has given a mortgage of her own real estate, merely to secure a debt of her husband's, she is entitled to have his interest in the estate as tenant by the curtesy first sold and applied towards paying the debt, in exoneration of her own interest in the mortgaged premises, even against another creditor of her husband, who holds a general lien upon his interest in the premises, created subsequently to the execution of the mortgage.⁵ But if she has joined with her husband in a mortgage of his real estate, she is not entitled to have the debt satisfied exclusively out of her husband's interest in such real estate, so as to give her dower out of the whole estate, notwithstanding the mortgage; she can be endowed only in the equity of redemption.⁶

§ 52. **The Rule in Massachusetts.**—The rules adopted in Massachusetts applicable to all these cases have been suc-

¹ *Rossiter v. Cossit*, 15 N. H. 38; *Norris v. Morrison*, 45 N. H. 490; *Woods v. Wallace*, 30 N. H. 384; *George v. Cooper*, 15 W. Va. 666.
² *Norris v. Morrison*, 45 N. H. 490; ⁴ *Harrow v. Johnson*, 3 Met. (Ky.) 578.
³ *Atkinson v. Stewart*, 46 Mo. 510.

⁵ *Gibson v. Crehore*, 5 Pick. (Mass.) 146; *Norris v. Morrison*, 45 N. H. 490. ⁶ *Neimcewicz v. Gahn*, 3 Paige (N. Y.), 614.
⁶ *Hawley v. Bradford*, 9 Paige

⁸ *Snyder v. Snyder*, 6 Mich. 470; (N. Y.), 200.

cinetly but fully stated by an eminent judge,¹ who says that the decisions establish these propositions : —

“ *First.* When a purchaser pays off a mortgage to which the right of dower would be subject, merely to clear the estate of the incumbrance, and not by virtue of any obligation to pay the mortgage-debt, and takes an assignment or a conveyance of his interests from the mortgagee, he may stand on the mortgage title if he please, and then no dower can be assigned without payment of the whole mortgage-debt by the demandant.²

“ *Second.* If in such case the mortgage be discharged, then he will be held to have redeemed, and the widow will take her dower in the equity, or by contribution, as she may elect, under Gen. Stats. c. 90, § 2.³

“ *Third.* But if the mortgage-debt be paid by the debtor, or from his property or in his behalf, then the payment will be treated as a satisfaction and discharge of the mortgage, and the widow will be remitted to her full right of dower.⁴

“ *Fourth.* The payment will be held to be made in behalf of the debtor, when there is an obligation imposed by the grantor upon the purchaser to assume and pay the debt as his own ; or when the grantor furnishes the means for the payment, as where, by the terms of the conveyance, the entire estate is sold, and the seller leaves a sufficient part of the purchase-money in the hands of the grantee for the purpose.⁵ In such cases, if the purchaser take an assignment of the mortgage to himself, he will not be allowed to set it up, but the legal title thus acquired will be held to merge in the equity.”⁶

§ 53. **Assignment of a Mortgage to the Owner of the Equity of Redemption not necessarily an Extinguishment of its Lien.** — The

¹ *Wells, J.*, in *McCabe v. Swap*, 14 Allen (Mass.), 188, 190.

² *Strong v. Converse*, 8 Allen (Mass.), 557; *McCabe v. Bellows*, 7 Gray (Mass.), 148.

³ *Newton v. Cook*, 4 Gray (Mass.), 46.

⁴ *Wedge v. Moore*, 6 Cush. (Mass.) 8.

⁵ *Brown v. Lapham*, 3 Cush. (Mass.) 551.

⁶ *Bolton v. Ballard*, 13 Mass. 227; *Snow v. Stevens*, 15 Mass. 278. And see *Hall v. Southwick*, 27 Minn. 234.

payment of the money due upon a mortgage-debt by the owner of the equity of redemption, who is not the debtor, and his taking an assignment of the mortgage, will operate as a payment or as a purchase of the mortgage, as will best serve the ends of justice and the proper intent of the parties.¹ Where the purchaser of an equity of redemption made a second mortgage thereof, and, while this was outstanding, took an assignment of the first mortgage, which he soon after assigned to a third person, it was held that the existence of the second mortgage at the time of these assignments prevented the merger of the first mortgage.² Where the purchaser of an equity of redemption takes an assignment of the mortgage to which it is subject, this will or will not operate an extinguishment of the mortgage, according to the interest of the party taking the assignment and the just intent of the parties.³ If the owner of mortgaged premises conveys different parts of them to separate grantees, and one of these pays and takes an assignment of the mortgage, he can, in the absence of circumstances which would make this inequitable,⁴ hold it against all the mortgaged premises.⁵ And if the purchaser of a bare equity of redemption which is subject to the incumbrance of two mortgages takes an assignment of the first mortgage for the protection of his title, this mortgage will not be thereby merged in the equity, so as to give to the holder of the junior mortgage a preference in payment out of the proceeds of the mortgaged property.⁶ And generally when a mortgage is assigned to one, not being the debtor, but having an interest in the mortgaged premises, the mortgage is not thereby extinguished if it is for the interest of the assignee to uphold it;

¹ Bullard v. Leach, 27 Vt. 491; 374; Crosby v. Taylor, 15 Gray Lond v. Lane, 8 Met. (Mass.) 517; (Mass.), 64.

Duncan v. Smith, 31 N. J. Law, 325. ⁴ *Postea*, §§ 75 *et seq.*

² Evans v. Kimball, 1 Allen (Mass.), 240. ⁵ Casey v. Buttolph, 12 Barb. (N. Y.) 637.

³ Hunt v. Hunt, 14 Pick. (Mass.) 240. ⁶ Millsbaugh v. McBride, 7 Paige (N. Y.), 509. And see McKinstry v. Mervin, 3 Johns. Ch. (N. Y.) 466.

this equitable doctrine of subrogation has so far been adopted at common law as to prevent a merger.¹ If the equity of redemption was subject when purchased to an attachment against the mortgagor which was junior to the mortgage, this will prevent a merger of the mortgage upon an assignment of the latter to the purchaser of the equity.²

§ 54. **Tests by which Merger is determined.** — Nor is it necessary that the intent to keep the mortgage alive should have been manifested at the time of the payment otherwise than by taking an assignment of the security; unless there appears to have been an intention to extinguish it, it will be taken to be subsisting or extinguished, as the interest of the party may require.³ The merger of a charge in the inheritance is not to be presumed, if this would be contrary to the interest of the owner of both the charge and the inheritance.⁴ The merger is prevented, and the charge or mortgage upheld, whenever there is a strong equity in favor of it, but never where it is not for an innocent purpose.⁵ When a charge on an estate becomes absolutely vested in the owner of the inheritance, the three tests usually applied for ascertaining whether the charge has merged, are, — *first*, whether there has been an actual expression of intention to that effect; *secondly*, whether the acts done by the owner of the estate are only consistent with the maintaining of the charge; and, *thirdly*, whether it is for the interest of the owner that the charge should not be merged in the inheritance.⁶

§ 55. **Incumbrance so assigned, kept alive only for a Good Purpose and to protect a Beneficial Interest.** — The owner of an equity of redemption who has taken an assignment of the mortgage cannot keep it on foot to the prejudice of a *bonâ fide*

¹ Hatch v. Kimball, 16 Maine, 146; Knowles v. Lawton, 18 Ga. 476.

² Grover v. Thatcher, 4 Gray (Mass.), 526.

³ Pool v. Hathaway, 22 Maine, 85; Hatch v. Kimball, 16 Maine, 146.

⁴ Forbes v. Moffatt, 18 Ves. 384; Davis v. Barrett, 14 Beav. 542; Shimer v. Hammond, 51 Iowa, 401.

⁵ Hatch v. Kimball, 16 Maine, 146.

⁶ Tyrwhitt v. Tyrwhitt, 32 Beav. 244.

purchaser under himself,¹ nor unless some beneficial interest is shown to require it.² And if the payment appears to have been intended at the time to extinguish the charge, it will have that effect.³ When the owner of the equity has paid the amount which was due upon the mortgage, and no intention of keeping the mortgage in force was disclosed at the time, and there was then no agreement for an assignment of the mortgage, but many years afterwards the mortgagee assigned the mortgage and the notes secured by it to the holder of the equity who had made the payment, this transaction was held to amount to a discharge of the mortgage.⁴

§ 56. **Mortgage assigned to the Principal Debtor is extinguished.** — If the mortgage-debt is paid by the principal debtor, or out of his funds, it cannot be kept alive by being assigned to him or to a mere agent for him.⁵ And the grantee of a mortgaged estate who has accepted a deed of the equity of redemption without covenants will be held, in the absence of a special contract, and without some special circumstances, to take the land charged with the incumbrance, as between himself and his grantor. Accordingly he cannot, after paying off the debt, keep it alive against his grantor by having it assigned to himself, so as to enable him to set it off against any unpaid balance that he may owe to his grantor upon his purchase.⁶ But if a mortgage has been assigned to the owner of the equity under such circumstances as to be tantamount to an extinguishment of the security, yet this owner, after assigning it as a valid instrument, will be estopped from claiming that it has become merged or extinguished, and this estoppel will also extend to such owner's grantee who is affected with notice of the circum-

¹ *Starr v. Ellis*, 6 Johns. Ch. (N. Y.) 393.

² *Gardner v. Astor*, 3 Johns. Ch. (N. Y.) 53; *Starr v. Ellis*, 6 Johns. Ch. (N. Y.) 393.

³ *Champney v. Coope*, 34 Barb. (N. Y.) 539.

⁴ *Given v. Marr*, 27 Maine, 212.

⁵ *Angell v. Boner*, 38 Barb. (N. Y.) 425; *Champney v. Coope*, 34 Barb. (N. Y.) 539; *Shepherd v. McLain*, 18 N. J. Eq. 128.

⁶ *Atherton v. Toney*, 43 Ind. 211.

stances.¹ And an assignment of a mortgage made to the principal debtor merely as an intermediary or a trustee will not necessarily extinguish the mortgage.² So, although the purchaser of an equity of redemption has expressly assumed and agreed to pay the mortgage-debt, so that an assignment of the mortgage to him would operate an extinguishment of its lien,³ if, when he pays the debt, he takes an assignment of the mortgage in blank instead of a discharge, and subsequently reissues the mortgage to a creditor of his own, filling up the blank in the assignment with the name of such creditor, the mortgage will be kept on foot, even against a subsequent purchaser from him with warranty.⁴

§ 57. **Conveyance of the Equity to the Holder of a Prior Incumbrance will not extinguish it in Favor of a Junior.**—If a prior incumbrancer acquires the absolute title to the incumbered property, his prior charge will not be taken to be merged in the absolute title where his interest and the intention of the parties unite to prevent the merger.⁵ He may still claim under his prior title; and the holder of the junior lien may still redeem from him as before.⁶ The estates of the mortgagor and of the mortgagee, though united in the same person, will still be treated as distinct, when this is necessary for just purposes and to effectuate the proper intention of the parties.⁷ Though it is a general rule that the purchase of the equity of redemption by the mortgagee operates to extinguish the mortgage-debt

¹ *Powell v. Smith*, 30 Mich. 451; 134; *Wallace v. Blair*, 1 Grant (Pa. Cas.), 75; *Edgerton v. Young*, 43 Ills. 464; *Lyon v. McIlvaine*, 24 Iowa, 9; *Wickersham v. Reeves*, 1 Iowa, 413; *Besser v. Hawthorne*, 3 Oregon, 129.

² *Angell v. Boner*, 38 Barb. (N. Y.) 425.

³ *Mickles v. Dillaye*, 15 Hun (N. Y.), 296.

⁴ *Kellogg v. Ames*, 41 N. Y. 259.

⁵ *Holden v. Pike*, 24 Maine, 427; *Thompson v. Chandler*, 7 Greenl. (Me.) 377; *Freeman v. Paul*, 3 Greenl. (Me.) 260; *Marshall v. Wood*, 5 Vt. 250; *Myers v. Brownell*, 1 D. Chip. (Vt.) 448; *Day v. Mooney*, 4 Hun (N. Y.), 135.

⁶ *Thompson v. Chandler*, 7 Greenl. (Me.) 377; *Strong v. Burdick*, 52 Iowa, 630; *Rogers v. Herron*, 92 Ills. 583.

⁷ *Hutchins v. Carleton*, 19 N. H. 487; *Ætna Ins. Co. v. Corn*, 89 Ills. 170; *Meacham v. Steele*, 93 Ills. 135.

and the mortgage-title by merging them in the absolute title, this rule will not be applied where it is the intention and the interest of the mortgagee to keep the mortgage alive by reason of intervening incumbrances or otherwise,¹ and this can be done without prejudice to the rights of the mortgagor of third parties.² Even if the mortgagee, in consideration of the conveyance to him of the equity of redemption, gives up the evidence of the mortgage-debt, or acknowledges its satisfaction, this will not necessarily extinguish his mortgage for the benefit of the holder of a subsequent lien.³ In equity a merger will not take place unless the purposes of justice or the intentions of the parties so demand.⁴ An express written agreement that there shall be no merger will prevent it.⁵ The holder of a mortgage may keep it alive as a part of his title after acquiring the equity of redemption,⁶ though he cannot do so unless this is necessary for the preservation of his rights.⁷

§ 58. **Conveyance of Equity in Payment of Prior, will not advance Junior, Incumbrance.** — A mortgagee having received from the mortgagor a deed of the mortgaged premises which contained a recital that the deed was to cancel the mortgage, and the land having been taken upon an attachment made before the execution of the deed and consummated by a levy afterwards, and the mortgage and the mortgage-notes having been retained by the mortgagee under a parol agreement with

¹ *McClaskey v. O'Brien*, 16 W. Va. 792.

² *Adams v. Angell*, 5 Ch. Div. 634; *Simpson v. Hall*, 47 Conn. 417; *Delaware & Hudson Canal Co. v. Bonnell*, 46 Conn. 9; *Campbell v. Vedder*, 1 Abbott (N. Y. App. Dec.), 295; *James v. Morey*, 2 Cow. (N. Y.) 246; *Mulford v. Peterson*, 35 N. J. Law, 127; *Vannice v. Bergen*, 16 Iowa, 555; *Webb v. Meloy*, 32 Wisc. 319; *Grellet v. Heilshorn*, 4 Nevada, 526.

³ *Baldwin v. Norton*, 2 Conn. 161, 709; *New England Jewelry Co. v. Merriam*, 2 Allen (Mass.), 390; *Simp-*

son v. Pease, 53 Iowa, 572; *Stanton v. Thompson*, 49 N. H. 272; *Adams v. Angell*, 5 Ch. Div. 634.

⁴ *Sheldon v. Edwards*, 35 N. Y. 279; *Bascom v. Smith*, 34 N. Y. 320; *Waterloo Bank v. Elmore*, 52 Iowa, 541; *Carpenter v. Brenham*, 40 Calif. 221; *Woodward v. Davis*, 53 Iowa, 694.

⁵ *Spencer v. Ayrault*, 10 N. Y. 202; *Fowler v. Fay*, 62 Ills. 375.

⁶ *New Jersey Ins. Co. v. Meeker*, 40 N. J. Law, 18; *Lockwood v. Sturdevant*, 6 Conn. 374; *Mobile Bank v. Hunt*, 8 Ala. 876.

⁷ *Jackson v. Evans*, 44 Mich. 510.

the mortgagor to await the result of the attachment, it was held that the taking of this deed did not operate an extinguishment of the mortgage in favor of the attaching creditor : for one party is not to be estopped by the recitals in a deed which he has taken from giving the truth in evidence to sustain it, against another party who is seeking to go behind the deed to prevent its operation.¹ The retention by a mortgagee of his mortgage and mortgage note or bond, on his taking a conveyance of the mortgaged premises, is *prima facie* sufficient evidence of his intention to keep the mortgage alive to prevent a merger.² And if he has cancelled his mortgage by reason of the junior incumbrance having been fraudulently concealed from him, he may by seasonable proceedings have the satisfaction cancelled, and be reinstated in his prior lien over the holder of the junior charge.³ So he may have the satisfaction cancelled and his mortgage reinstated, if his purchase of the equity, which was the consideration of the satisfaction, is afterwards set aside.⁴ If the rights of the parties require it, equity will regard a mortgage as remaining in force, though a deed of the equity of redemption has been accepted as a foreclosure thereof.⁵

§ 59. **When a Conveyance of the Equity to the Mortgagee will be regarded as a Payment of the Mortgage-debt.** — Whether the mortgage-debt will be considered to have been paid by a conveyance of the equity of redemption to the mortgagee, will depend upon the intention of the parties.⁶ Where a mortgagor of land, by deed, for a valuable consideration expressed therein, conveyed the mortgaged premises to the mortgagee, it was held that, in the absence of evidence that this conveyance was intended by the parties as a payment of the notes which were secured by the mortgage, these notes might still be collected or negotiated by the mortgagee.⁷ The owner of an equity of

¹ Crosby v. Chase, 17 Maine, 369.

² Dunphy v. Riddle, 86 Ills. 22.

³ Young v. Hills, 31 N. J. Eq. 429.

⁴ Hemstreet v. Burdick, 90 Ills. 444.

⁵ Worcester Bank v. Cheeney, 87 Ills. 602; Brooks v. Rice, 56 Calif. 428.

⁶ Germania Building Association v. Neill, 93 Penn. St. 322.

⁷ Van Deusen v. Frink, 15 Pick. (Mass.) 449.

redemption sold it to a purchaser, who assumed the payment of the mortgage; this purchaser gave a second mortgage of the same premises, which was assigned to the first mortgagee, and then conveyed the premises to this mortgagee, with warranty against all persons claiming under him, and a covenant that there were no incumbrances made by him except the second mortgage; and it was held that the first mortgage was not merged by this conveyance, and the mortgagee could still collect the note secured thereby from the original debtor, whatever the value of the premises.¹ But if a party takes from a mortgagor an assignment without recourse of a second mortgage upon the premises, given by a purchaser of the equity of redemption who has assumed the payment of the first mortgage, and who so states in his second mortgage, and if thus holding the second mortgage he then takes an assignment of the first mortgage, he cannot collect the note secured by the first mortgage from the original mortgagor; for this mortgagor would then be subrogated to the priority of the first mortgage over the second, and thus be enabled to get back exactly the amount he would have paid from the party to whom he would have paid it.² The Massachusetts cases just cited hold that a conveyance of the mortgaged premises made by the mortgagor to the mortgagee will not operate a payment of the mortgage-debt, unless it is shown affirmatively that this was the intention of the parties: if that intention does appear, it will be carried into effect.³ Elsewhere it has been decided that the presumption is the other way; that the mortgage-debt is paid by such a conveyance, unless it appears that the parties intended otherwise.⁴ It has even been held that such a conveyance of part of the mortgaged premises will operate an extinguishment of the mortgage-debt *pro tanto*;⁵ but that it

¹ Tucker v. Crowley, 127 Mass. 400. (N. Y.) 35; Clift v. White, 12 N. Y.

² Swett v. Sherman, 109 Mass. 231. 519; Wilhelmi v. Leonard, 13 Iowa,

³ Holman v. Bailey, 3 Met. (Mass.) 330; Lilly v. Palmer, 51 Ills. 331; 55. Astley v. Milles, 1 Sim. 298; Tyr-

⁴ Bassett v. Mason, 18 Conn. 131; whitt v. Tyrwhitt, 32 Beav. 244.

Burnet v. Denniston, 5 Johns. Ch. ⁵ Wilhelmi v. Leonard, 13 Iowa, 330.

will be only *pro tanto* an extinguishment, although this conveyance of part of the mortgaged property comes from one who had purchased that part from the mortgagor, and had agreed to pay off the whole mortgage.¹

§ 60. **An Intervening Estate will prevent a Merger.**—If the holder of a mortgage which is the oldest lien upon the property, and which is for an amount exceeding the value of the property, takes from the mortgagor a conveyance of the mortgaged premises to save the expense of a foreclosure, this will not operate a merger of his mortgage-title, so as to enable the holder of a junior lien to take the premises without paying the first mortgage-debt.² But if the senior mortgagee should purchase the mortgaged premises from the mortgagor and undertake to pay the junior incumbrance, deducting its amount from the price of his purchase, this would postpone the lien of his senior mortgage to that of the junior incumbrance.³ It has been said to be a general principle that whenever the owner of an estate has also a charge upon it, and there is another intermediate charge or estate between his own charge and his ownership in fee, it is reasonable to say that without some special act no presumption can be made of an intention to merge the charge in the fee, for that might be against the interest of the owner, by letting in the intermediate estate; but if the intervening estate were created by the act of the owner himself, this reasoning would have no application.⁴

§ 61. **The Doctrine of Two Funds.**—Where one creditor holds security upon two funds or estates, with perfect liberty to resort to either for the payment of his demand, and another creditor holds a junior security upon one only of these funds, equity will compel the former creditor to exhaust the fund upon which he alone has security, before coming upon the latter

¹ Klock v. Cronkhite, 1 Hill (N. Y.), 107.

³ Fowler v. Fay, 62 Ills. 375.

⁴ Johnson v. Webster, 4 De G.,

² Campbell v. Carter, 14 Ills. 286, M. & G. 474.

289; Jarvis v. Frink, 14 Ills. 396;

Adams v. Angell, 5 Ch. Div. 634.

fund, and thereby depriving the latter creditor of his security;¹ and in a decree foreclosing a junior mortgage the senior mortgagee may be ordered to exhaust for the satisfaction of his claim all the other property described in the senior mortgage, before resorting to that which is covered by the junior mortgage.² If such prior incumbrancer does exhaust the only fund which is pledged to the holder of the junior lien, the latter is entitled to be subrogated to the former's lien upon the other fund, or to any balance thereof remaining after the full payment of the prior lien, of which the senior creditor might and should have availed himself.³ Thus, a bank holding a judgment against one of its stockholders, for which, besides its judgment-lien upon his real estate, it has also a lien upon his stock, may indeed collect its judgment out of his real estate; but his other judgment-creditors, who are thereby deprived of the opportunity of collecting their money, shall be subrogated to the rights of the bank, so as to enable them to hold the debtor's bank stock.⁴ As the creditor having the choice of two funds ought to exercise his right of election in such a manner as not to injure those creditors who can resort to only one of these funds, so if he, in the exercise of his legal rights, exhausts that fund, to which alone the other creditors can resort, equity will place them in his situation, so far as he has applied their funds to the satisfaction of his claim.⁵

¹ *Gibson v. Seagrim*, 20 Beav. 614; *Lanoy v. Athol*, 2 Atk. 446; *Fox, in re*, 5 Irish Ch. 541; *Russell v. Howard*, 2 McLean C. C. 489; *Warren v. Warren*, 30 Vt. 530; *York & Jersey Steamboat Co. v. Jersey Co.*, Hopkins Ch. (N. Y.) 460; *Baird v. Jackson*, 98 Ills. 78; *Wise v. Shepherd*, 13 Ills. 41; *Glass v. Pullen*, 6 Bush (Ky.), 346; *Nelson v. Dunn*, 15 Ala. 501.

² *Swift v. Conboy*, 12 Iowa, 444; *Henshaw v. Wells*, 9 Humph. (Tenn.) 568; *Davenport Plow Co. v. Mewis*, 10 Nebraska, 317; *Sternberg v. Valentine*, 6 Mo. App. 176.

³ *Mower's Trusts, in re*, L. R. 8 Eq. 110; *Dolphin v. Aylward*, L. R. 4 Ho. Lds. 486; *Hunt v. Townsend*, 4 Sandf. Ch. (N. Y.) 510; *Cheeseborough v. Millard*, 1 Johns. Ch. (N. Y.) 409; *Slade v. Van Vechten*, 11 Paige (N. Y.), 21; *Ingalls v. Morgan*, 10 N. Y. 178; *Gist v. Pressley*, 2 Hill Eq. (So. Car.) 318.

⁴ *Ramsey's Appeal*, 2 Watts (Penn.), 228.

⁵ *Alston v. Mumford*, 1 Broek. C. C. 266.

§ 62. **A Creditor whose Fund has been taken to pay a Prior Debt subrogated to the Lien of that Debt on other Funds.** — If a prior creditor of two funds obtains satisfaction of his demand out of that fund which alone is pledged to a junior creditor, and thereby exhausts that fund, equity will subrogate the latter creditor to the former's lien upon that fund which is not exhausted.¹ A debtor against whom there had been issued executions which were liens upon his personal estate, having assigned his property to a trustee for the payment of his debts, and directed that the avails of certain cloth should first be applied to the payment of notes given by him to the vendors of the wool which had been used in the manufacture of the cloth, and this cloth having been taken on the executions, the assignee bid it in, and afterwards sold it for a much larger sum; and it was held that the other parts of the assigned property, as between the vendors of the wool and the general creditors, were the primary funds for the payment of the executions which were liens upon all the assigned property, and that these vendors were entitled to be subrogated to the rights of the execution-creditors against the other parts of the assigned property, so far as their cloth had been applied to pay such execution-creditors, and that the assignee should reimburse himself for the amount of his bid to buy in the cloth from the general fund, so as to give to these vendors the benefit of all the proceeds of the cloth, so far as should be necessary to satisfy their notes.²

§ 63. **Doctrine of Two Funds not applied, if it would work Injustice to Senior Creditor.** — But this general rule, that a creditor having a prior lien upon two funds will not be allowed so to apply them as to exclude a creditor having a junior lien upon one only of the same funds from the benefit of his lien, will not be applied in any case where it would work an injustice to the creditor having the prior lien to restrict him to

¹ Findlay v. United States Bank,
2 McLean C. C. 44.

² Slade v. Van Vechten, 11 Paige
(N. Y.), 21.

only one fund.¹ He cannot be compelled to confine himself to only one of the funds, unless that fund is shown to be sufficient to satisfy his demand.² He will not be compelled to resort to a fund of which he can realize the benefit only by litigation;³ if he holds both a prior mortgage and also certain promissory notes as collateral security for the same debt, the holder of a junior lien upon the mortgaged premises cannot require him to prosecute suits upon the notes before foreclosing his mortgage.⁴ A mortgagee of both the goods and the accounts of his debtor will not be obliged to collect the accounts and apply their proceeds upon his claim against the debtor, in order to aid other creditors who are unsecured.⁵ Or, if the prior mortgagee, in an action for his debt, obtains the additional security of a sufficient attachment, but the validity of this attachment is contested in another action, a junior mortgagee cannot require him to litigate this question before resorting to the mortgaged property.⁶ Nor will the prior mortgagee be compelled to go into another jurisdiction, there to prosecute the fund to which he has the exclusive right.⁷ But the junior creditor's right of subrogation to the securities of which the senior creditor thus declines to avail himself will be preserved after the satisfaction of the latter.⁸

¹ *Woolcocks v. Hart*, 1 Paige (N. Y.), 185; *James v. Hubbard*, 2 Paige (N. Y.), 128; *Herriman v. Skilman*, 33 Barb. (N. Y.) 378; *Van Mater v. Eley*, 12 N. J. Eq. 271; *Thayer v. Daniels*, 113 Mass. 129; *Bruner's Appeal*, 7 Watts & Serg. (Penn.) 269; *McCormick's Appeal*, 57 Penn. St. 54; *Newbold v. Newbold*, 1 Del. Ch. 310; *Post v. Mackall*, 3 Bland (Md.), 486; *General Ins. Co. v. United States Ins. Co.*, 10 Md. 517; *Jones v. Zollicoffer*, 2 Hawks (Nor. Car.) 623; *Behn v. Young*, 21 Ga. 207; *Calloway v. People's Bank*, 54 Ga. 572; *Wolf v. Smith*, 36 Iowa, 454; *United States v. Duncan*, 12 Ills. 523; *Morrison v. Kurtz*, 15 Ills. 193; *Sweet v. Redhead*, 76 Ills. 374; *Logan v. Anderson*, 18 B. Mon. (Ky.) 114; *Cannon v. Kreip*, 14 Kans. 324.

² *Crocker v. Shropshire*, 59 Ala. 542; *Mason's Appeal*, 89 Penn. St. 402.

³ *Walker v. Covar*, 2 So. Car. 16; *Kidder v. Page*, 48 N. H. 330.

⁴ *Wolf v. Smith*, 36 Iowa, 454.

⁵ *Emmons v. Bradley*, 56 Maine, 333.

⁶ *Simmons Hardware Co. v. Brokaw*, 7 Nebraska, 405.

⁷ *Denham v. Williams*, 39 Ga. 312.

⁸ *King v. McVickar*, 3 Sandf. Ch. (N. Y.) 192.

§ 64. **Where one of the Two Funds is itself subject to Prior Incumbrances.** — A creditor who holds security upon two tracts of land, one of which is the debtor's homestead, cannot be compelled by another creditor holding a junior security upon the tract which is not a homestead to resort first for the satisfaction of his demand to the homestead, so as to leave the other tract, so far as may be, for the second creditor.¹ But if the prior creditor had chosen to resort first to the homestead, or even to release the other land and then come upon the homestead, the debtor could not have complained; there is no such implied obligation on the holder of a mortgage which covers both a homestead and other property to exhaust first his remedy against the other property as to prevent him from taking such a course;² for the rule in equity that where one creditor has a lien upon two funds, and another creditor has a subsequent lien upon only one of them, the former will be required to satisfy his claim primarily out of that fund on which the latter has no lien, has no application as between debtor and creditor; it is applicable only as between different creditors.³ When a person takes a mortgage upon land, of which one portion is, and another portion is not, already incumbered, he acquires the right to satisfy his debt in the first instance out of that property which is not incumbered; and this right will not be impaired by a subsequent mortgage of that part to another creditor. The junior mortgagee cannot require him to run the risk of being obliged to pay off a prior incumbrance before he can enforce his own security.⁴

§ 65. **Doctrine of Two Funds not applied where it would be injurious to Third Parties.** — A junior creditor cannot compel a prior creditor to resort first to that fund which he alone can make available, in any case where this would injuriously affect rights that have vested in others.⁵ Where a debtor gave

¹ *McArthur v. Martin*, 23 Minn.

74; *Marr v. Lewis*, 31 Ark. 203.

² *Chapman v. Lester*, 12 Kans. 592.

³ *Rogers v. Meyers*, 68 Ills. 92.

⁴ *Dodds v. Snyder*, 44 Ills. 53.

⁵ *Leib v. Stribling*, 51 Md. 285;

McGinniss's Appeal, 16 Penn. St. 445;

McClaskey v. O'Brien, 16 W. Va. 792.

to a building association a mortgage of two lots of land and an assignment of five shares of stock as additional security for the same debt, and after giving a second mortgage of one of the lots sold his interest in the stock to other parties, the second mortgagee, although he could require the association to enforce its mortgage first upon the lot which was not subject to his charge, had no right to compel it to appropriate the stock to the payment of its debt;¹ while the principal debtor still owned the stock, it was liable to be applied upon the debt secured by the first mortgage, so as to relieve the security of the second mortgagee;² but the burden of this latent equity would not accompany the stock into the hands of a *bonâ fide* purchaser thereof for value.³ The junior incumbrancer cannot insist that the funds shall be marshalled, when the effect of this will be to destroy the remedies or impair the rights of the purchasers or *bonâ fide* grantees of one or both of the funds or estates.⁴

§ 66. **Where one of the Funds is primarily liable for the Payment of both Debts.**—A testator who held one estate in fee-simple and another estate in fee-tail left an annuity charged upon all his property. A judgment-creditor of the testator, whose judgment was a charge upon both estates, having sold first the fee-simple estate, the proceeds of which were insufficient to pay his demand, and then the other estate, the annuitant claimed the right to marshal the securities as against the remainder-man of the fee-tail estate, so as to recoup out of the surplus proceeds of that estate the amount which had been paid to the creditor out of the fee-simple estate; and it was held that he had no right to do so. “To authorize the marshalling,” said the Master of the Rolls, “it is obviously neces-

¹ Reilly v. Mayer, 12 N. J. Eq. 55.

² Herbert v. Mechanics' Building Association, 17 N. J. Eq. 497; Phillipsburg Building Association v. Hawk, 27 N. J. Eq. 355; Red Bank Building Association v. Patterson, 27 N. J. Eq. 223.

³ Reilly v. Mayer, 12 N. J. Eq. 55.

⁴ Barnes v. Racster, 1 Yo. & Co. Ch. 401; Bugden v. Bignold, 2 Yo. & Co. Ch. 377; Lloyd v. Galbraith, 32 Penn. St. 103; Green v. Ramage, 18 Ohio, 428.

sary, not only that a claim should exist against a fund subject in common with another fund to a paramount liability, but also that those interested in that other fund should not have a right to throw that liability upon the fund of the claimant. A man's own property, in which alone his legatees can claim, must be applied to the payment of his debts, in preference to the property of another, against which the statute merely gives a remedy."¹

§ 67. **Junior Creditor cannot claim the Benefit of a Lien established subsequently to his own.** — One lien-creditor cannot claim to be subrogated to any security taken by another which had not become a lien when he secured his own: accordingly a subsequent mortgagee, having also taken a bond for his debt, but without a warrant to confess judgment, cannot insist that a prior mortgagee shall enter up judgment upon a bond and warrant of attorney that accompanied his mortgage, in order to throw him upon other property; nor can the subsequent mortgagee object to the waiver of a judgment, subsequently confessed upon the prior bond, though purposely withdrawn in order to make way for other judgment-creditors of the mortgagor, whose liens upon the other property are posterior in date to his lien upon the mortgaged premises.²

§ 68. **Creditor subrogated only to a Fund which ought to have discharged the Debt his Fund has paid.** — One fund cannot be applied to the relief of another upon the principle of subrogation or substitution, unless it is made clearly to appear that the former fund was liable for the payment of the debt which the latter fund has discharged.³ The liability of the shareholders in an insurance company being unlimited as to the general creditors, but restricted as to the policy-holders, the company borrowed money upon the security of certain calls upon its members. Before this debt was paid, the company

¹ Douglass v. Cooley, Irish R. 2 Eq. 311.

³ Greenlee v. McDowell, 3 Jones Eq. (Nor. Car.) 325.

² Miller v. Jacobs, 3 Watts (Penn.), 477.

was wound up; and the debt was subsequently paid out of the calls. The policy-holders desired to have the amount of this debt repaid from the unlimited assets, so as to throw the burden of its payment upon these and not upon the limited assets; but it was held that they had no right in equity to have the debt thus thrown upon the unlimited assets.¹ Under such circumstances no call could be made upon the shareholders for the purpose of recouping to the policy-holders the amount of the capital which had been paid to the general creditors; for the liability of the shareholders is only secondary,² and the policy-holders could assert no priority in the capital over the general creditors.³

§ 69. **Doctrine of Two Funds applied only if Debtors are the same.** — This doctrine of two funds is applied only to cases in which two creditors have the same common debtor.⁴ If the first creditor has a judgment against A and B, and the second creditor has one against B only, the latter cannot compel the former to restrict himself to the property of A, when it does not appear whether A or B ought, as between themselves, to pay the debt due to the first creditor, and no equitable rights are shown in B to have the debt charged upon A alone.⁵ So, also, if one creditor has a lien for his demand upon the property of two separate debtors, and another creditor has a junior lien only upon the fund belonging to one of the debtors, the latter creditor cannot insist that the former shall collect his claim wholly out of that debtor whom the latter creditor cannot reach, unless it be shown that there are such relations existing between the co-debtors as to make it equitable that the debtor having but one creditor should pay the whole of the demand against the two debtors; for equity will not sanction

¹ International Life Ass. Co., *in re*, 2 Ch. Div. 476.

² Professional Life Ins. Co., *in re*, L. R. 3 Eq. 668.

³ State Ins. Co., *in re*, 1 De Gex, Jones, & Smith, 634.

⁴ Carter v. Neal, 24 Ga. 346; Knouf's Appeal, 91 Penn. St. 78.

⁵ Dorr v. Shaw, 4 Johns. Ch. (N. Y.) 17; Lloyd v. Galbraith, 32 Penn. St. 103.

a principle which, though it may be just as to the creditors, is unjust as to the debtors.¹

§ 70. **Junior Creditor cannot be subrogated until Prior Creditor satisfied.** — Before one creditor can be subrogated to the rights of another, the demand of the latter must be satisfied, so that he shall be relieved from all further trouble, risk, and expense.² And if one creditor has got his payment from the fund which was available to another, under such circumstances as to entitle the latter to be subrogated to the former's claim against another fund, yet the latter must claim his subrogation before the rights of any assignee of that fund have accrued.³

§ 71. **Application of these Principles to a Case of Several Creditors of Joint and Several Debtors.** — The Pittsburg Bank having the first judgment against and lien on the real estate of Peter Peterson, Lewis Peterson, and James Kincaid, took on its execution and sold a tract of land which was the individual property of Lewis Peterson, whereby its judgment became satisfied. The Monongahela Navigation Company had the second judgment against and lien on the real estate of the two Petersons, but not against Kincaid or his estate. William Speer next had a judgment against and lien on the real estate of the two Petersons, but not against Kincaid or his estate. After these judgments, William Taylor obtained three judgments against the Petersons and Kincaid, on which Thomas Dale became bail for the stay of execution, and as such paid the three judgments, after other judgments had been obtained against the Petersons and Kincaid. Among the number of these was a judgment in favor of Sylvanus Lathrop, upon which the real estate of the Petersons and Kincaid was taken in execution and sold, as also under a prior levy upon the judgment in favor of the Pittsburg Bank. Under these circumstances it was held that the navigation company was entitled to be subrogated to the rights of the bank, and to have

¹ *Wise v. Shepherd*, 13 Ills. 41.

² *Carter v. Neal*, 24 Ga. 346.

³ *Williams v. Washington*, 1 Dev. Eq. (Nor. Car.) 137.

its judgment satisfied out of the money arising from the sale; and then that William Speer was, upon a like principle, entitled to receive the residue of the money towards the satisfaction of his judgment; but that Thomas Dale could maintain no claim to be subrogated to the rights of the bank or to receive any portion of the money, in preference to the judgment-creditors of the Petersons and Kincaid, though such judgments might be subsequent in point of time to Taylor's judgments.¹

§ 72. Release by Prior Creditor of Fund primarily liable to him. — A prior creditor of two funds, who has actual notice of such a junior charge upon one of those funds as to entitle the junior creditor to require him to resort in the first instance to the other fund, will, by a release of the fund thus primarily liable to him, postpone his claim to the fund upon which both have a lien to that of the second creditor, to the extent of the value of the primary fund; so far as the subsequent creditor is concerned, the debt of the prior creditor is *pro tanto* satisfied by such a release.² Accordingly, where one creditor had a lien upon two pieces of land belonging to the same debtor, and another creditor had a junior lien upon one only of these tracts, and the first creditor by his conduct released his claim upon that tract upon which his was the only lien, which was more than sufficient to have paid the whole of his demand, it was held that the debt due to the junior creditor should be first satisfied out of that tract on which both had a lien.³ Where the agent of a judgment-creditor was present at the sale by the debtor to a third party of certain lands on which the judgment was a lien, and drew the conveyance, and was informed of the terms of the sale, and the debtor afterwards delivered to such agent as security for the payment of the judgment-debt the notes taken for the purchase-money of the lands, it was held that this was constructive notice to the creditor of the facts, and that the receipt of the notes by his agent with knowledge

¹ Lathrop's Appeal, 1 Penn. St. 512.

³ Glass v. Pullen, 6 Bush (Ky.),

² Washington Building Association 346.

v. Beaghen, 27 N. J. Eq. 98.

of their consideration, although it did not destroy the lien which the creditor had upon the land as security for the payment of his judgment, in case it should not be otherwise satisfied, imposed upon him in equity the duty to apply the proceeds of the notes in reduction of the judgment; and that the creditor was also bound in equity to retain all other property which had been delivered to him as security for the judgment, and to apply its proceeds also upon the judgment before resorting to the land and taking it away from the purchaser thereof; and that the surrender by the creditor of any such security, sufficient to have satisfied the debt, discharged the lien of the judgment upon this land in the hands of the purchaser.¹

§ 73. **But Release of Primary Fund will not prejudice Prior Creditor if made in Good Faith and without Notice.** — If, however, the prior creditor's release of the fund primarily liable to him was made in good faith, and without knowledge of the facts which established the claim of the junior creditor, his release will not prejudice his right of precedence in the common fund over the subsequent creditor.² Nor will his claims upon the secondary fund be prejudiced unless his rights to the primary fund which he has chosen to abandon were clear and not seriously contested, and his remedies for obtaining its application upon his demand were reasonably clear and efficient.³ A settlement of a contested litigation, made in good faith, whereby he receives less than its value from the primary fund, will not interfere with the prosecution of his right to the secondary fund.³ Although a second mortgagee of part of the same property which is covered by the first mortgage may require the first mortgagee to act with reasonable diligence in enforcing and preserving his rights, yet he cannot in equity compel the latter to account for the value of property covered by his mortgage, which has without his fault been put out of his reach by the mortgagor.⁴

¹ *Ingalls v. Morgan*, 10 N. Y. 178.

³ *Kidder v. Page*, 48 N. H. 380.

² *Cheeseborough v. Millard*, 1 Johns. Ch. (N. Y.) 409.

⁴ *Shields v. Kimbrough*, 64 Ala. 504.

§ 74. **Purchase of a Portion of an Incumbered Estate; Rights of the Purchaser.** — The purchaser of land which, in common with other land, is subject to an incumbrance, for the payment of which the other land is, or has become by his purchase, the primary fund, acquires by his purchase the right of paying off the lien or other incumbrance, and of becoming by that act subrogated for his indemnity to the rights of its holder.¹ If the mortgage-debt is not, as between the two estates, to be charged primarily upon either, he can yet require a reasonable contribution from the holders of the other land, the general rule being that when the estates of two or more persons are subject to a common incumbrance, for the payment of some debt or the performance of some duty common to both, and one pays the whole for the benefit of all, he shall have the right to hold all the estates thus redeemed, until the others shall reimburse him an equitable proportion of the sum which he has thus paid for their common benefit;² or if he has paid his proportion of the debt, and the mortgagee, having sold the other land for enough to pay the remainder, fails to enforce these sales by agreement with the owners of such other lands, the mortgagee cannot afterwards further hold his land for any balance which the other land fails to pay.³ If, however, the primary liability for the payment of the debt rested upon the estate of him who has satisfied it, then his payment will give him no claim upon the rest of the incumbered property, even though he took an assignment of the mortgage or other charge.⁴

§ 75. **Order of Liability of Separate Parcels of Incumbered Estate sold successively.** — When premises, the whole of which

¹ *Fletcher v. Chase*, 16 N. H. 38; *Vt.* 28; *Young v. Williams*, 17 Conn. 393; *Skeel v. Spraker*, 8 Paige (N. Y.), 182; *Cheeseborough v. Millard*, 1 Johns. Ch. (N. Y.) 409; *Stevens v. Cooper*, 1 Johns. Ch. (N. Y.) 425.

² *Shaw, C. J.*, in *Chase v. Woodbury*, 6 Cush. (Mass.) 143, 146; *Brown v. Worcester Bank*, 8 Met. (Mass.) 47; *Allen v. Clark*, 17 Pick. (Mass.) 47; *Salem v. Edgerley*, 33 N. H. 46; *Chittenden v. Barnley*, .

³ *Jeunings v. Vickers*, 31 La. Ann. 679.

⁴ *Chase v. Woodbury*, 6 Cush. (Mass.) 143; *Cushing v. Ayer*, 25 Maine, 383.

are subject to the burden of a mortgage or other charge, are successively sold in different parcels to different purchasers with warranty, the rule almost universally adopted to determine the comparative liability of the different parcels is that any portion retained by the debtor or mortgagor shall be first applied to the payment of the debt secured by the charge or mortgage,¹ and if that is not sufficient, then the other parcels shall be resorted to in the inverse order of their alienation, the parcel last sold being first applied upon the debt.² The first purchaser from the mortgagor has the prior equity, although he did not actually pay the consideration for his purchase until after other portions of the mortgaged premises had been purchased and paid for by other purchasers.³ This principle of charging different portions of the mortgaged premises which

¹ *Edwards v. Applegate*, 70 Ind. 325; *Gantz v. Toles*, 40 Mich. 725.

² *Holden v. Pike*, 24 Maine, 427; *Cushing v. Ayer*, 25 Maine, 383; *Wallace v. Stevens*, 64 Maine, 225; *Bradley v. George*, 2 Allen (Mass.), 392; *Pike v. Goodnow*, 12 Allen (Mass.), 472; *Allen v. Clark*, 17 Pick. (Mass.) 47; *Sanford v. Hill*, 46 Conn. 42; *Hunt v. Mansfield*, 31 Conn. 488; *Brown v. Simons*, 44 N. H. 475; *Gates v. Adams*, 24 Vt. 71; *Lyman v. Lyman*, 32 Vt. 79; *Clowes v. Dickinson*, 5 Johns. Ch. (N. Y.) 235; S. C., on appeal, 9 Cow. (N. Y.) 403; *James v. Hubbard*, 1 Paige (N. Y.), 228; *Skeel v. Spraker*, 8 Paige (N. Y.), 182; *Kellogg v. Rand*, 11 Paige (N. Y.), 59; *Dows v. Congdon*, 16 How. Pr. (N. Y.) 571; *Welch v. James*, 22 How. Pr. (N. Y.) 474; *Green v. Milbank*, 3 Abbott New Cas. (N. Y.) 138; *Chapman v. West*, 17 N. Y. 125; *Harrison v. Guerin*, 27 N. J. Eq. 219; *Mickle v. Rambo*, 1 N. J. Eq. 501; *Gaskill v. Sine*, 2 Beasley (N. J.), 400; *Keene v. Munn*, 16 N. J. Eq. 398; *Dawes v. Cammus*, 32 N. J. Eq. 456; *Commer-*

cial Bank v. Western Reserve Bank, 11 Ohio, 444; *Nailer v. Stanley*, 10 Serg. & R. (Penn.) 450; *Cowden's Estate*, 1 Penn. St. 267; *Paxton v. Harrier*, 11 Penn. St. 312; *Beddow v. De Witt*, 43 Penn. St. 326; *Conrad v. Harrison*, 3 Leigh (Va.), 532; *McLung v. Beirne*, 10 Leigh (Va.), 394; *Jones v. Myrick*, 8 Gratt. (Va.) 179; *Schofield v. Cox*, 8 Gratt. (Va.) 533; *Pallen v. Agricultural Bank*, 1 Freem. (Miss.) 419; *Dugger v. Tayloe*, 60 Ala. 504; *Birnic v. Main*, 29 Ark. 591; *Aikin v. Bruen*, 21 Ind. 137; *Alsop v. Hutchings*, 25 Ind. 347; *McCullum v. Turpie*, 32 Ind. 146; *Lock v. Fulford*, 52 Ills. 166; *Matteson v. Thomas*, 41 Ills. 110; *Iglehart v. Crane*, 42 Ills. 261; *State v. Titus*, 17 Wisc. 241; *Warren v. Foreman*, 19 Wisc. 35; *Aiken v. Milw. & St. Paul R. R. Co.*, 37 Wisc. 469; *Sibley v. Parker*, 23 Mich. 312; *Cooper v. Bigley*, 13 Mich. 463; *Payne v. Avery*, 21 Mich. 524.

³ *Gouverneur v. Lynch*, 2 Paige (N. Y.), 300. And see *George v. Kent*, 7 Allen (Mass.), 16.

have been sold at different times after the execution of the mortgage, in the inverse order of their alienation, is not confined to the original alienations of the mortgagor who is personally responsible for the debt. It is equally applicable to several conveyances of separate parcels of the mortgaged premises made at different times by his grantee, who conveys with warranty.¹ The first purchaser of a portion of an estate, the whole of which is subject to the burden of a mortgage, judgment-lien, or other incumbrance, acquires by his purchase an equitable right to have the payment of the debt which creates the incumbrance cast upon the remaining property;² and each subsequent purchaser of other portions of the incumbered estate takes subject to this right in prior purchasers, and acquires the same right against those who purchase other portions subsequently to his purchase.³ And the subsequent purchasers have sufficient notice of the equitable charge; for when the records disclose an incumbrance upon property of which a party is taking a conveyance, and also disclose the further fact that this incumbrance rests likewise upon other property, and on an examination directed to this other property disclose the additional fact that a conveyance of this latter property has been made which creates an equitable right in the grantee thereof to throw the burden of the incumbrance upon the first property, the intending purchaser must be presumed to have made such examination, and accordingly to have had notice of such equitable right.⁴ But this rule has no application to a case in which successive conveyances of different parcels of the mortgaged property have been made to the same purchaser.⁵

§ 76. **Rule in Iowa and Kentucky.** — But this rule of applying upon the mortgage such portions of the mortgaged

¹ *Guion v. Knapp*, 6 Paige (N. Y.), 35. *Iglehart v. Crane*, 42 Ills. 261; *Judson v. Dada*, 79 N. Y. 373.

² *Hunt v. Mansfield*, 31 Conn. 488; *Gilbert v. Haire*, 43 Mich. 283; *McClaskey v. O'Brien*, 16 W. Va. 792. ⁴ *Hunt v. Mansfield*, 31 Conn. 488; *Iglehart v. Crane*, 42 Ills. 261.

³ *Hahn v. Behrman*, 73 Ind. 120; *Lynch v. Hancock*, 14 So. Car. 66; ⁵ *Steere v. Childs*, 15 Hun (N. Y.), 511.

property as have been conveyed by the mortgagor in the inverse order of their alienation has not been followed in Iowa and Kentucky. In Iowa the rule is laid down, that where portions of the mortgaged property have been sold and conveyed subsequently to the mortgage, and the mortgagor retains the remaining part, the portion which remains unsold should indeed be first subjected in equity to the payment of the mortgage-debt;¹ for although the mortgage is a lien resting upon all the estate alike, yet the mortgagor, in addition to the legal obligations resulting from the stipulations in his mortgage-deed, as well as from the covenants in his deed to his grantee, is morally bound to pay the debt, and to clear away any incumbrance from the property which he has sold; but that, as between the grantees who have purchased different parcels of the incumbered estate from the mortgagor at different times, there is no greater moral obligation to pay the debt resting upon one than upon the other; and accordingly the subsequent purchasers of the different portions of the mortgaged premises must contribute ratably to the discharge of the incumbrance.² The same doctrine is maintained in Kentucky.³ And it has been held in Georgia that the purchasers of parts of the mortgaged property from the mortgagor have not the right to compel the mortgagee to resort for the payment of his debt to that part of the mortgaged property which remains in the possession of the mortgagor.⁴

§ 77. **No Distinction between Mortgage and Judgment-lien or other Incumbrance.** — A distinction has sometimes been made between the lien of a judgment or attachment and that of a mortgage. It was decided in Virginia that where a judgment has been recovered against a debtor which is a lien upon his real estate, and he subsequently conveys his lands by sepa-

¹ *Taylor v. Short*, 27 Iowa, 361.

³ *Dickey v. Thompson*, 8 B. Mon.

² *Barney v. Meyers*, 28 Iowa, 472; (Ky.) 312; *Beall v. Barclay*, 10 B. Griffith *v. Lovell*, 26 Iowa, 226; *Mas-* Mon. (Ky.) 261; *Morrison v. Beck-* sie *v. Wilson*, 16 Iowa, 390; *Bates v.* with, 4 T. B. Mon. (Ky.) 73.

⁴ *Knowles v. Lawton*, 18 Ga. 476.

rate conveyances made at various times in different parcels to different grantees, all the debtor's lands in the hands of these respective grantees are alike liable to the creditor, and must contribute to satisfy the judgment *pro rata*, and not in the inverse order of their alienation;¹ but doubt was speedily thrown upon this decision by the same court which had rendered it,² and it has since been expressly overruled.³ And in Tennessee it has been held that the several purchasers of different tracts of land from one whose real estate is all subject to the lien of an execution are mere strangers to each other; and if some of these purchasers afterwards lose their lands by having them sold on the execution, they have no right either of indemnity or contribution against the others, and no remedy against the grantor, if their purchases were by deed and without fraud or warranty.⁴ But the great mass of the cases put the incumbrance of a judgment upon exactly the same ground as any other incumbrance, as to its effects upon the rights of subsequent purchasers of parts of the incumbered premises.⁵ The same rule will be applied to a devise of lands charged with the payment of legacies: portions of the lands which have been conveyed by the devisee at different times will be charged for the legacies in the hands of his grantees in the inverse order of their alienation by him;⁶ and the same rule has been applied to the incumbrance of a widow's right of dower.⁷

¹ *Beverley v. Brooke*, 2 Leigh (Va.), 426. *Barnes v. Mott*, 64 N. Y. 397; *Ingalls v. Morgan*, 10 N. Y. 178; *Howard*

² *Conrad v. Harrison*, 3 Leigh (Va.), 532. *Ins. Co. v. Halsey*, 8 N. Y. 271; *James v. Hubbard*, 1 Paige (N. Y.),

³ *McLung v. Beirne*, 10 Leigh (Va.), 394; *Henkle v. Allstadt*, 4 Gratt. (Va.) 284; *Rodgers v. McCluer*, 4 Gratt. (Va.) 81. 228; *Taylor v. Maris*, 5 Rawle (Penn.), 51; *Nailer v. Stanley*, 10 Serg. & R. (Penn.) 450; *Ebenhardt's Appeal*, 8 Watts & Serg. (Penn.) 327; *Cowden's Estate*, 1 Penn. St. 266; *Edwards v. Applegate*, 70 Ind. 325.

⁴ *Jobe v. O'Brien*, 2 Humph. (Tenn.) 34. ⁵ *Elwood v. Deifendorf*, 5 Barb. (N. Y.) 398; *Jenkins v. Freyer*, 4

⁶ *Hunt v. Mansfield*, 31 Conn. 488; *Pallen v. Agricultural Bank*, 1 Freem. (Miss.) 419; *Welch v. James*, 22 How. Pr. (N. Y.) 474; *Clowes v. Dickinson*, 5 Johns. Ch. (N. Y.) 235; ⁷ *Raynor v. Raynor*, 21 Hun (N. Y.), 36.

⁷ *Raynor v. Raynor*, 21 Hun (N. Y.), 36.

§ 78. Release of Estate primarily liable discharges *pro tanto* that secondarily liable.—From the foregoing rule as to the order in which the different parcels of the incumbered premises should be charged, it follows that if the mortgagee, with sufficient notice of the facts,¹ releases from the lien of his mortgage that portion of the premises which is primarily liable thereto, he thereby releases *pro tanto* that portion of the premises which is only secondarily liable; for he has thereby prevented the subrogation to which the owner of the latter portion would, upon his payment, be entitled against the former.² When, after such a release, the incumbrance is sought to be enforced against the owner of the latter portion, he can claim an abatement of his liability to the extent of the value of that portion which should have been made the primary fund for the payment of the debt.³ Thus, if the mortgagee of several parcels of land releases one parcel, he will be held to junior incumbrancers for its proportionate value;⁴ but this conclusion would not follow if it was shown that the mortgagor had no title to the lot released, so that the subsequent grantees of the mortgagor could be in no way prejudiced by the release.⁵ Nor will the release of a part of the mortgaged premises from the lien of the mortgage in any manner affect that lien upon the residue of the premises, as between the original parties; so far as their rights are concerned, every part of the mortgaged

¹ *Postea*, § 81.

² *James v. Hubbard*, 1 Paige (N. Y.), 228; *Livingston v. Freeland*, 3 Barb. Ch. (N. Y.) 510; *Ingalls v. Morgan*, 10 N. Y. 178; *Guion v. Knapp*, 6 Paige (N. Y.), 35; *Blair v. Ward*, 10 N. J. Eq. 119; *Harrison v. Guerin*, 27 N. J. Eq. 219; *Paxton v. Harrier*, 11 Penn. St. 312; *Brown v. Simons*, 44 N. H. 475; *Parkman v. Welch*, 19 Pick. (Mass.) 231; *Johnson v. Rice*, 8 Greenleaf (Me.), 157; *Iglehart v. Crane*, 42 Ills. 261; *Mobile Ins. Co. v. Huder*, 35 Ala. 713.

³ *Hoy v. Bramhall*, 19 N. J. Eq. 74 and (on appeal) 563; *Gaskill v. Sine*, 2 Beas. (N. J.) 400; *La Farge Ins. Co. v. Bell*, 22 Barb. (N. Y.) 54; *Taylor v. Short*, 27 Iowa, 361; *Johnson v. Williams*, 4 Minn. 260; *Warner v. De Witt County Bank*, 4 Ills. App. 305.

⁴ *Wolf v. Smith*, 36 Iowa, 454; *Birnie v. Main*, 29 Ark. 591; *Stevens v. Cooper*, 1 Johns. Ch. (N. Y.) 425.

⁵ *Taylor v. Short*, 27 Iowa, 361; *Van Orden v. Johnson*, 14 N. J. Eq. 376.

premises is bound for the payment of the whole debt.¹ The release of the primary fund will exonerate the secondary fund in the hands of one who has purchased the latter since the creation of the lien, although the release contained an express reservation of all rights against such purchaser.² If a mortgagee, having actual notice of a subsequent mortgage upon a portion of the same land, releases that portion upon which he has an exclusive lien, and which was of sufficient value to have satisfied his whole claim, the court, in applying the proceeds of a foreclosure sale of the remainder of the premises, will postpone his claim to that of the subsequent mortgagee.³ Such a junior incumbrancer has an equitable right to have the property which is not included in his security, but is subject to the prior lien, first applied to the satisfaction of that prior lien, to the relief of his security.⁴ Where lands which are subject to an incumbrance are conveyed with warranty to a purchaser for value, this purchaser and his grantees occupy a position similar to that of sureties for the debtor, and are entitled to the same equities as sureties would be.⁵ A release by the creditor without their consent, and with knowledge of their rights, of any security to which they would be entitled, on payment of the debt, discharges *pro tanto* the lien on their property.⁶

§ 79. Release of Estate primarily liable will not exonerate Estate secondarily liable, unless in Justice it ought to have that Effect. — But the rule of charging different parcels of land which are subject to a common incumbrance in the inverse order of their alienation by the debtor being a mere rule of equity, and a release to a subsequent purchaser of one parcel of the land not being a technical discharge of the parcels previously conveyed from the lien of the incumbrance, it will not

¹ *Contant v. Servoss*, 3 Barb. 533; *Mickle v. Rambo*, 1 N. J. Eq (N. Y.) 128. 501; *Baring v. Moore*, 4 Paige (N. Y.), 166.

² *Dugger v. Tayloe*, 60 Ala. 504.

³ *Deuster v. McCamus*, 14 Wisc. 307; *Alsop v. Hutchings*, 25 Ind. 347.

⁵ *Postea*, § 86 *et seq.*

⁶ *Barnes v. Mott*, 64 N. Y. 397; *Ingalls v. Morgan*, 10 N. Y. 178;

⁴ *Schofield v. Cox*, 8 Gratt. (Va.) *Hicks v. Bingham*, 11 Mass. 300.

be treated as an equitable release, except in those cases in which, upon principles of natural justice and equity, it ought so to operate against the one giving the release.¹ Thus, where a mortgagor, having sold and conveyed a part of the mortgaged premises and received full payment therefor, afterwards sold the remainder of the premises to another purchaser for their full value, with the agreement that all the purchase-money should be applied upon the mortgage-debt, and the premises thus be relieved from the lien of the mortgage, it was held that the mortgagee did not, by receiving the value of this residue from the second purchaser, and thereupon releasing the land conveyed to him from the lien of the mortgage, discharge wholly or in part the portion conveyed to the first purchaser from the lien of the mortgage for the balance of the debt; the full value of the second purchase having been applied upon the mortgage-debt, the first purchaser had enjoyed all his rights.² It has been held that if a mortgagor sells a portion of an estate which is incumbered by a mortgage to secure the payment of various debts, to a purchaser who has constructive, though not actual, notice of the mortgage, and transfers the notes given by such purchaser for the purchase-money to one of the mortgage-creditors, to be applied upon one of the mortgage-debts, the payment of these notes by the purchaser to one of the mortgage-creditors does not release the land thus purchased from the lien of the mortgage, unless it was so agreed between the purchaser and the mortgagees.³ A prior purchaser from the debtor who has not yet paid all his purchase-money must, to the extent of the unpaid purchase-money, contribute to the relief of a subsequent purchaser who has been compelled to pay a common incumbrance; nor will this right of the subsequent purchaser be affected by the fact that he had agreed with his grantor, the original debtor, to pay the amount due upon the common lien out of his purchase-money, if it appears that he

¹ *Kendall v. Niebuhr*, 58 How. Pr. (N. Y.) 156; S. C. 45 N. Y. 277.
² *Patty v. Pease*, 8 Paige (N. Y.), Superior Ct. 542.
³ *Colby v. Cato*, 47 Ala. 247.

made this agreement in consequence of fraudulent misrepresentations of his grantor as to the amount of the incumbrance.¹ If, after the original incumbrance, the debtor first gave a mortgage upon part of the incumbered premises, which has not been foreclosed, and subsequently gave an absolute deed of the residue to another party, then, on foreclosure of the original incumbrance, the part secondarily mortgaged should be sold first, and the surplus proceeds of this sale beyond the amount due upon the second mortgage should be applied in payment of the original incumbrance, before resorting to a sale of the residue of the incumbered premises, which was sold and conveyed absolutely.² And if such second mortgagee, after an absolute sale of the residue of the premises with warranty to a subsequent purchaser, takes from the mortgagor a quitclaim deed of the property mortgaged to him, and the interest thus conveyed to him is equal in value to the sum due upon the first mortgage on the entire premises, then it is the duty of the second mortgagee and his grantees to discharge that first mortgage, without contribution from such subsequent purchaser; and an assignment of the first mortgage to the second mortgagee will exonerate the lands which have been conveyed to the subsequent purchaser.³

§ 80. **Release of any Remedy to which the Subsequent Grantee would be subrogated releases the Lien on the latter's Property.**—Any act of the prior incumbrancer releasing a remedy to which the grantee of the owner of the equity of redemption would, on paying the debt, be entitled to be subrogated, will release the lien of the prior incumbrance on the property in the hands of such grantee.⁴ If, after a mortgagor has given a second mortgage of premises which are subject to a prior mortgage, the first mortgagee, with notice of the second mortgage, diminishes the security of the junior incumbrancer

¹ *Beddow v. De Witt*, 43 Penn. St. 326.

² *Kellogg v. Rand*, 11 Paige (N. Y.), 59.

³ *Pike v. Goodnow*, 12 Allen (Mass.), 472.

⁴ As in the case of sureties: *postea*, § 119 *et seq.*

by releasing the mortgagor from personal responsibility for his debt, he will thereby postpone his lien upon the property to that of the second mortgagee ;¹ if, with notice of the facts, he gives such a release after a conveyance by the mortgagor to a purchaser of part of the mortgaged premises who has acquired by his purchase the right to throw the burden of the incumbrance upon the mortgagor and upon the residue of the mortgaged property in his hands, this will discharge the land of such purchaser from its liability under the mortgage, even though at the time of such release the payment of the mortgage-debt was assumed by another person, the purchaser not having assented to this substitution.²

§ 81. **Prior Incumbrancer not affected by Subsequent Alienations of the Premises unless notified of them.** — Before the holder of a mortgage or other incumbrance upon property can be required to shape his action in the collection of his demand with reference to the order of subsequent alienations of portions of the incumbered property, he must have notice of what that order is,³ other than the mere constructive notice derived from the registry of the deeds given subsequently to the execution of his mortgage.⁴ The prior incumbrancer is not bound to take notice of subsequent liens or conveyances, or of litigation which arises concerning them ;⁵ and subsequent purchasers of portions of the mortgaged premises who desire the mortgagee to act with reference to the order of subsequent alienations by the mortgagor must give notice to him of the facts in proper time, and request him to act accordingly.⁶

¹ *Sexton v. Pickett*, 24 Wisc. 346.

² *Coyle v. Davis*, 20 Wisc. 564.

³ *Patty v. Pease*, 8 Paige (N. Y.), 277 ; *La Farge Ins. Co. v. Bell*, 22 Barb. (N. Y.) 54 ; *James v. Brown*, 11 Mich. 25.

⁴ *George v. Wood*, 9 Allen (Mass.), 80 ; *Wheelwright v. DePeyster*, 4 Edw. Ch. (N. Y.) 232 ; *Hoy v. Bramhall*, 19 N. J. Eq. 74 and 563 ; *Birnie v.*

Main, 29 Ark. 591 ; *Straight v. Harris*,

14 Wisc. 509 ; *Hosmer v. Campbell*,

98 Ills. 572.

⁵ *Stuyvesant v. Hone*, 1 Sandf. Ch. (N. Y.) 419.

⁶ *Horning's Appeal*, 90 Penn. St. 388 ; *McIlvain v. Mutual Assurance Co.*, 93 Penn. St. 30 ; *Iglehart v. Crane*, 42 Ills. 261 ; *King v. McVickar*, 3 Sandf. Ch. (N. Y.) 192.

They cannot remain passive until after a foreclosure has been completed, and then assert their rights against the mortgagee in view of facts of which the latter had no knowledge.¹ The equity which entitles a second mortgagee or a purchaser from the mortgagor to the benefit of a release given by the first mortgagee arises only where the first mortgagee gave the release with notice of the second incumbrance or conveyance.² If the release was given without notice of the equities existing in favor of the subsequent incumbrancer or grantee, the first mortgagee who gave it is not responsible for the consequences of his act, nor is the lien of his mortgage upon the unreleased portion of the premises in any wise impaired thereby.³ But if a mortgagee, before giving a partial release of his mortgage, employs an attorney to examine the title to the mortgaged property, the mortgagee is chargeable with notice of all the conveyances thereof found by such attorney upon record, although they have not been communicated by the attorney to him.⁴ Actual notice is not necessary in such cases; knowledge of facts which impose the duty of inquiring before acting is sufficient;⁵ but the mere possession of a subsequent grantee, without the prior mortgagee's knowing who has possession, is not sufficient,⁶ unless he also knows who has such possession and its character.⁷

§ 82. **The Mortgagor may by Stipulation vary the Order of Liability.**—If the owner of incumbered premises, in conveying different parcels thereof, fixes in his conveyances the order of primary liability for the payment of the incumbrance, then this order will follow the different parcels in subsequent con-

¹ *Matteson v. Thomas*, 41 Ills. (N. Y.), 35; *Holman v. Norfolk Bank*, 110; *Blair v. Ward*, 10 N. J. Eq. 12 Ala. 369.
119.

² *George v. Wood*, 9 Allen (Mass.), (N. Y.) 156; *S. C.* 45 N. Y. Superior Court, 542.
80; *Powell v. Hayes*, 31 La. Ann. 789.

³ *Vanorden v. Johnson*, 14 N. J. Eq. 376; *Taylor v. Maris*, 5 Rawle 240.
(Penn.), 51; *Guion v. Knapp*, 6 Paige

⁴ *Kendall v. Niebuhr*, 58 How. Pr.

⁵ *Hall v. Edwards*, 43 Mich. 473.

⁶ *Coggsell v. Stout*, 32 N. J. Eq.

⁷ *Dewey v. Ingersoll*, 42 Mich. 17.

veyances thereof.¹ Accordingly, if the owner of land subject to a mortgage conveys a portion thereof, the value of which is more than sufficient to pay the mortgage-debt, with a provision in the deed that the purchaser is to assume and pay the whole of the mortgage, and afterwards conveys the remainder of the land with the understanding that the mortgage is to be paid off by the former purchaser, and the mortgagee subsequently takes a mortgage upon the portion first conveyed, with notice of the facts, the purchaser of the second lot may maintain a bill in equity to redeem the same without contribution towards the payment of the debt secured by the first mortgage.² The contract of the mortgagor is binding upon the land in the hands of any subsequent purchaser who acquires his title with knowledge of his grantor's agreement.³ But proof of a purchase of land with full covenants of warranty for less than its value is no proof that the purchaser undertook to discharge a mortgage thereon of the existence of which he does not appear to have had actual notice.⁴ It has been held in New Jersey that, as between a mortgagor and his voluntary grantee with full covenants, the latter has a right in equity, in the absence of any facts which would disentitle him to this protection, to cast the burden of an incumbrance existing at the time of the conveyance upon the remaining land of the grantor which is also subject to the incumbrance; but if it was a voluntary conveyance from the mortgagor to his wife, and the covenants were inserted without the knowledge of the grantor, then the burden of the incumbrance would not be shifted; and testimony of the grantor that his voluntary grantee understood that the conveyance was subject to the mortgage is admis-

¹ *Hoy v. Bramhall*, 19 N. J. Eq. 74 and 563; *Mayo v. Merrick*, 127 Mass. 511; *Stevens v. Goodenough*, 26 Vt. 676; *Zabriskie v. Salter*, 80 N. Y. 555; *Torrey v. Orleans Bank*, 9 Paige (N. Y.) 649; *Atwood v. Vincent*, 17 Conn. 575; *Engle v. Haines*, 1 Halst. (5 N. J. Eq.) 186; *Ross v. Haines*, Id. 632; *Briscoe v. Power*, 47 Ills. 447.

² *Welch v. Beers*, 8 Allen (Mass.), 151.

³ *Hoar, J.*, in *Welch v. Beers*, *supra*.

⁴ *Kilborn v. Robbins*, 8 Allen (Mass.), 466.

sible to rebut the equity which would otherwise arise under the deed to shift the burden of the incumbrance to that part of the property retained by himself: the effect of such testimony would be to subject the portion of the premises conveyed to her to pay its proportional part of the mortgage-debt.¹

§ 83. **Extent of the Right of a Subsequent Purchaser.**—Where lands upon which a judgment is a lien are advertised for sale under the judgment, and parts of these lands have previously been sold by the debtor, and there are other lands of the debtor unsold, but the lien of the judgment upon these latter lands would expire before they could be advertised and sold, the owner of the judgment will not be bound, upon the requisition of the purchaser from the debtor, to abandon the sale of the lands which he has advertised. The purchaser's remedy would be to offer to pay the judgment, and then, by filing his bill in equity against all parties in interest before the expiration of the lien of the judgment, he could enforce his equitable rights to contribution and indemnity.² After such a tender, the owner of the judgment would have no right to proceed with his levy and sale.³ If the purchaser's land is sold upon the judgment, he can compel one who purchased from the debtor subsequently to himself to indemnify him to the extent of the value of the lands of such subsequent purchaser.⁴ A purchaser from the debtor or mortgagor of part of the incumbered premises cannot redeem his property alone from the incumbrance; he must pay the whole debt.⁵ But if the mortgagee or holder of the lien himself becomes, with notice, the owner of the property which is primarily liable for the payment of the debt, and is of sufficient value therefor,

¹ *Harrison v. Guerin*, 27 N. J. Eq. 219.

² *James v. Hubbard*, 1 Paige (N. Y.), 228.

³ *Welch v. James*, 22 How. Pr. (N. Y.) 474.

⁴ *Clowes v. Dickinson*, 5 Johns. Ch. (N. Y.) 235; S. C., on appeal, 9 Cow. (N. Y.) 403; *James v. Hubbard*, 1 Paige (N. Y.), 228.

⁵ *Street v. Beal*, 16 Iowa, 68.

then such a purchaser may redeem his property from the incumbrance without paying any portion of the debt.¹

§ 84. *Instances of the Application of these Rules.* — Three pieces of land had been attached by a creditor of their owner. While the attachment-suit was pending, the debtor sold and conveyed one of the pieces for a valuable consideration, and afterwards gave a mortgage of the two remaining pieces, the grantees in these conveyances having no actual knowledge of the attachment. The creditor in the attachment-suit then recovered judgment, and the mortgagees purchased this judgment, and levied it upon the piece first conveyed. The grantee of this piece tendered the mortgagees the amount of the judgment, but they refused to accept it, or to levy their execution upon the other pieces, which were sufficient to satisfy it; and it was held that this grantee acquired by his purchase an equitable right against the debtor to have the other pieces first applied to the satisfaction of the judgment; that the debtor's subsequent mortgage of the remaining pieces could convey to the mortgagees no better title than he himself had, and that they took their mortgage subject to the same equitable burden; and accordingly that their purchase of the judgment did not give them the right to levy their execution on the piece first sold, so long as the other pieces were sufficient to satisfy it.² A debtor gave to one of his creditors a mortgage to secure his debt. A second creditor levied an execution upon his equity of redemption, and had an undivided share thereof set off to him in satisfaction of his judgment. The debtor then gave to a third creditor a second mortgage of his interest in the equity of redemption, which was foreclosed. The first mortgagee then obtained a decree of foreclosure against the other creditors, the time limited to the second creditor to redeem being a week later than that limited to the third creditor. A stranger, at the instance of the second mortgagee, the third creditor, paid

¹ *Bradley v. George*, 2 Allen (Mass.), 392; *Meacham v. Steele*, 93 Ills. 135.

² *Hunt v. Mansfield*, 31 Conn. 488.

to the first mortgagee the amount of his debt and costs, and took for his security an assignment of the first mortgage-debt and a conveyance of all the second mortgagee's interest in the premises. After this payment, and before the expiration of the time limited for the second creditor to redeem, the second creditor tendered to this stranger the amount so paid by him, and demanded a release of his interest in the premises, which was refused. The court held that the second creditor had acquired by his levy an indefeasible interest in his share of the equity of redemption, with the right, as against the rest of the land, to perfect his title by paying a corresponding share of the debt secured by the first mortgage; that the third creditor, by his mortgage and the foreclosure thereof, became the owner of the residue of the equity, with a like right to redeem his share; and that the second and third creditors thus became tenants in common of the equity of redemption, each owning an undivided share thereof, and each bound to pay a proportionate share of the prior incumbrance; and that the stranger having, in behalf of the third creditor, paid the whole of the prior incumbrance, could now call upon the second creditor to contribute his proportional share thereof, or be foreclosed of his interest in the equity of redemption.¹ C sold fifty acres of land, and took from the purchaser a bond and mortgage for \$870 of the purchase-money, and afterwards purchased a farm from K, and gave to him a bond and mortgage for the purchase-money, and as a further security assigned to him the mortgage upon the fifty acres; and both of these mortgages were afterwards assigned by K to J, in payment of a debt. C then sold and conveyed the farm with warranty; and the farm subsequently came by sundry mesne conveyances to S. J then obtained a decree to foreclose the mortgage upon the fifty acres; and C afterwards repurchased the fifty acres, and agreed with the giver of the mortgage to satisfy this decree of

¹ *Young v. Williams*, 17 Conn. 393. See also *Mallory v. Hitchcock*, 29 Conn. 127.

foreclosure, but failed to do so, and afterwards conveyed the fifty acres to a *bonâ fide* purchaser, who paid him therefor. It was held that the mortgage upon the fifty acres was the primary fund for the payment of the debt to J, and that S, who had obtained an assignment of both securities, was entitled to enforce the decree upon that mortgage for the payment of the balance which was due upon it.¹ A debtor, having given a first mortgage of a lot of three hundred and sixty acres of land, and then a second mortgage of all but seventy-five acres of the first parcel, and then a third mortgage of the whole parcel, it was held that the second mortgagee had the right to require that the debt due upon the first mortgage should be enforced first upon the seventy-five acres not included in his second mortgage, and that the third mortgagee had no right to call upon the second mortgagee to contribute *pro ratâ* to the satisfaction of the first mortgage-debt.² A railroad company having taken for the construction of its road the title to a portion of a piece of land, upon which there was a prior mortgage, of which mortgage the company had constructive notice, it was held, upon a foreclosure of the mortgage and a sale in parcels of the whole of the mortgaged premises, that the company was bound to contribute to the payment of the mortgage-debt, if the same were not paid by the sale in the inverse order of alienation of the other property covered by the mortgage, the full value of the land which it had taken as of the time of the taking, with interest to the time of payment; so that the railroad company was in effect allowed to redeem its land from the mortgage-lien by the payment of a ratable proportion of the mortgage-debt, to the extent of the full value of the land at the time of their taking it with interest.³ The owner of two tracts of land, having given a mortgage of both of them to secure the payment of a loan to him, sold one of the tracts to a purchaser, who, by the terms of his deed, assumed the pay-

¹ Skeel v. Spraker, 8 Paige (N. Y.), (Va.), 532; S. P. in Sibley v. Baker, 182. 23 Mich. 312.

² Conrad v. Harrison, 3 Leigh ³ Dows v. Congdon, 16 How. Pr. (N. Y.) 571.

ment of the whole mortgage-debt, and also gave a mortgage back to his grantor, conditioned to save him harmless from the original mortgage. This purchaser afterwards sold his tract to other vendees, the amount of the debt due upon the original mortgage being deducted from the price. This tract was held to have become by these conveyances the primary fund for the payment of the mortgage; nor did it cease to be such because the original owner afterwards agreed to discharge his mortgage; for that was a mere personal security to himself.¹

§ 85. **When the Purchaser of an Equity of Redemption assumes the Payment of the Mortgage.** — It is generally held that an agreement by the purchaser of an equity of redemption with his vendor that he will himself assume and pay the mortgage-debt will render him personally liable, not only to his grantor but also directly to the holder of the mortgage.² The original doctrine, which is still often supported, was that this right of the mortgagee to hold the purchaser of the equity of redemption, by reason of the latter's agreement with the mortgagor to assume the payment of the mortgage-debt, does not rest upon the theory that the mortgagee can maintain an action at law upon this agreement between the mortgagor and the purchaser, but on the ground that the contract of the purchaser is a collateral stipulation obtained by the mortgagor, which by equitable subrogation inures to the benefit of the mortgagee.³ The mortgagee is said to stand on the rights of

¹ *State v. Ripley*, 32 Conn. 150.

² *Burr v. Beers*, 24 N. Y. 178; *Vrooman v. Turner*, 8 Hun (N. Y.), 78; *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253; *Duuning v. Fisher*, 20 Hun (N. Y.), 178; *Campbell v. Smith*, 8 Hun (N. Y.), 6; *Lamb v. Tucker*, 42 Iowa, 118; *Thompson v. Bertram*, 14 Iowa, 476; *Moses v. Dallas District Court*, 12 Iowa, 139; *Urquhart v. Brayton*, 12 R. I. 169; *Lennig's Estate*, 52 Penn. St. 135; *Thomp-*

son v. Thompson, 4 Ohio St. 333; *Schmucker v. Seibert*, 18 Kans. 104; *Willson v. Phillips*, 27 Tex. 543; *Carley v. Fox*, 38 Mich. 387; *Miller v. Thompson*, 34 Mich. 10; *Fitzgerald v. Barker*, 70 Mo. 685; *Ricard v. Sanderson*, 41 N. Y. 179; *Schlatter v. Greaud*, 19 La. Ann. 125; *Tunnard v. Hill*, 10 La. Ann. 247; *Herbert v. Doussan*, 8 La. Ann. 267.

³ *Crowell v. Currier*, 27 N. J. Eq. 152; S. C., on appeal, *nom. Crowell v.*

his debtor, and to be entitled to appropriate for his debt any security held by his debtor for its payment; and his remedy is restricted to the privilege of subrogation to the rights of his debtor.¹ Accordingly the mortgagee has been allowed to enforce the personal liability of such a purchaser only to the extent of the deficiency upon a foreclosure sale of the mortgaged premises,² and only if the party to whom the purchaser's agreement was given was himself personally liable for the payment of the mortgage-debt.³ The doctrine of equity was that, when the grantee in a deed assumed the payment of the mortgage-debt, he was to be regarded as the principal debtor, and the mortgagor occupied the position of a surety; and the mortgagee was permitted to resort to this grantee to recover the deficiency after applying the proceeds of a sale of the mortgaged premises by virtue of the equitable doctrine of subrogation, by which the creditor was entitled to the benefit of all the collateral securities which his debtor had obtained to reinforce the principal obligation.⁴ But the broad doctrine has since been laid down, that if one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon the promise, though he was not privy to the consideration thereof;⁵ and it was then held in un-

St. Barnabas Hospital, 27 N. J. Eq. 650; Klapworth v. Dressler, 2 Beasl. (N. J. Eq.) 62; Jarman v. Wiswall, 9 C. E. Green (N. J. Eq.), 68, 267; Wilson v. King, 23 N. J. Eq. 150; Garnsey v. Rogers, 47 N. Y. 237; Trotter v. Hughes, 12 N. Y. 74; King v. Whitely, 10 Paige (N. Y.), 465; Halsey v. Reed, 9 Paige (N. Y.), 446; Curtis v. Tyler, 9 Paige (N. Y.), 432; Blyer v. Monholland, 2 Sandf. Ch. (N. Y.), 478; Scott v. Featherston, 5 La. Ann. 306.

¹ Crowell v. Currier, 27 N. J. Eq. 152 and 650.

² Klapworth v. Dressler, 13 N. J. Eq. 62; Halsey v. Reed, 9 Paige (N. Y.), 446.

³ King v. Whitely, 10 Paige (N. Y.), 465.

⁴ Trotter v. Hughes, 12 N. Y. 74; Curtis v. Tyler, 9 Paige (N. Y.), 432; Brown v. Winter, 14 Calif. 31; William & Mary College v. Powell, 12 Gratt. (Va.) 372.

⁵ Lawrence v. Fox, 20 N. Y. 268; Fischer v. Hope Ins. Co., 69 N. Y. 161; Hand v. Kennedy, 83 N. Y. 149; Farley v. Cleveland, 4 Cow. (N. Y.) 432; S. C., on error, 9 Cow. (N. Y.) 639; Ayer's Appeal, 28 Penn. St. 179; Lewis v. Sawyer, 44 Maine, 332; Cross v. Truesdale, 28 Ind. 44; Lamb v. Donovan, 19 Ind. 40.

qualified terms that a mortgagee or other incumbrancer may maintain a personal action against a purchaser from the owner of the equity of redemption who has agreed with his grantor to assume and pay off the incumbrance, and that whether or not the party with whom the agreement was made was himself personally liable upon the mortgage-debt,¹ and that a purchaser who has made such an agreement cannot afterwards be released therefrom by his grantor, to whom it was made, without the consent of the creditor, to whose benefit it inures.² The development of this doctrine, though doubtless an outgrowth of the law of substitution, scarcely comes within the scope of the present investigation. It is sufficient to say that it has also been emphatically denied;³ and the court which laid down this proposition in its broadest terms has refused to apply it to the case of a bond given to a retiring partner by the remaining members of the firm to secure him from his liability upon the partnership debts, or to allow a firm creditor to maintain an action upon such a bond,⁴ and has said that the rule is one which ought not to be extended.⁵

¹ *Antea*, n. 2, p. 94.

² *Douglass v. Wells*, 18 Hun (N. Y.), 88 (overruling *Stephens v. Casbacker*, 8 Hun (N. Y.), 116, and disapproving *Crowell v. St. Barnabas Hospital*, 27 N. J. Eq. 650); *Fleischauer v. Doellner*, 58 How. Pr. (N. Y.) 190. See *Young v. School Trustees*, 31 N. J. Eq. 290.

³ *Prentice v. Brimhall*, 123 Mass. 291; *Collt, J.*, in *Pettee v. Peppard*,

120 Mass. 522; *Exchange Bank v. Rice*, 107 Mass. 37; *Millard v. Baldwin*, 3 Gray (Mass.), 484; *Mellen v. Whipple*, 1 Gray, 317; *Mason v. Barnard*, 36 Mo. 384; *Booth v. Conn. Ins. Co.*, 43 Mich. 299.

⁴ *Merrill v. Green*, 55 N. Y. 270.

⁵ *Pardee v. Treat*, 82 N. Y. 385. And see *Garnsey v. Rogers*, 47 N. Y. 233.

CHAPTER III.

SUBROGATION IN CASES OF SURETYSHIP.

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§ 86. **Surety's Right of Subrogation.**—A surety, on paying the debt for his principal, is entitled to be subrogated to all the securities, funds, liens, and equities, which the creditor holds against the principal debtor, or as a means of enforcing payment from him.¹ This right will be enforced whether the

¹ *Lake v. Brutton*, 8 De G., M. & G. 440; *Newton v. Chorlton*, 10 Hare, 646; *Praed v. Gardner*, 2 Cox Ch. Cas. 86; *Goddard v. Whyte*, 2 Giff. 449; *Copis v. Middleton*, Turn. & Russ. 224; *Drew v. Lockett*, 32 Beav. 499; *Wooldridge v. Norris*, L. R. 6 Eq. 410; *Heyman v. Dubois*, L. R. 13 Eq. 158; *Hunter v. United States*, 5 Peters, 173, 182; *Dennis v. Rider*, 2 McLean C. C. 451; *United States Bank v. Winston*, 2 Brock. C. C. 252; *Brown v. Lang*, 4 Ala. 50; *Foster v. Athenæum*, 3 Ala. 302; *Colvin v. Owens*, 22 Ala. 782; *Fawcetts v. Kimmey*, 33 Ala. 261; *Talbot v. Wilkins*, 31 Ark. 411; *Newton v. Field*, 16 Ark. 216; *Belcher v. Hartford Bank*, 15 Conn. 381; *McDowell v. Wilmington Bank*, 1 Harringt. (Del.) 369; *Hardcastle v. Commercial Bank*, 1 Harringt. (Del.) 374, *note*; *Ottawa Bank v. Dudgeon*, 65 Ills. 11; *Billings v. Sprague*, 49 Ills. 509; *Keokuk v. Love*, 31 Iowa, 119; *Sears v. Laforce*, 17 Iowa, 473; *Burk v. Chrisman*, 3 B. Mon. (Ky.) 50; *Lumpkin v. Mills*, 4 Ga. 343; *Davis v. Smith*, 5 Ga. 274; *Howe v. Frazer*, 2 Rob. (La.) 424; *Davidson v. Carroll*, 20 La. Ann. 199; *Scott v. Featherston*, 5 La. Ann. 306; *West v. Creditors*, 3 La. Ann. 529; *Groves v. Steel*, 2 La. Ann. 480; *Tuck v. Calvert*, 33 Md. 209; *Winder v. Dufferfer*, 2 Bland Ch. (Md.) 166, 199;

surety is bound in one instrument with the principal or not;¹ and it will be transmitted to the surety's assignees, and to his creditors, when the principal demand has been so used as to destroy their subordinate liens upon his property,² and to his grantees, who have lost the property conveyed by him to them in consequence of its being taken upon the principal obligation.³ And from this right of subrogation on the part of the surety it follows that the creditor must do nothing to defeat the right; if he takes property from the principal debtor as a pledge or security for the debt, he must hold such property fairly and impartially, for the benefit of the surety, as well as for his own protection; and if he parts with such property without the knowledge and consent of the surety, he will lose

Johnson v. Bartlett, 17 Pick. (Mass.) 477; *Stanwood v. Clampitt*, 23 Miss. 372; *Conway v. Strong*, 24 Miss. 665; *Dozier v. Lewis*, 27 Miss. 679; *Allison v. Sutherland*, 50 Mo. 274; *Sweet v. Jeffries*, 48 Mo. 279; *Arnot v. Woodburn*, 35 Mo. 99; *Miller v. Woodward*, 8 Mo. 169; *Wilson v. Burney*, 8 Nebraska, 39; *Low v. Blodgett*, 21 N. H. 121; *Dearborn v. Taylor*, 18 N. H. 153; *Young v. Vough*, 23 N. J. Eq. 325; *Irick v. Black*, 17 N. J. Eq. 189; *Lewis v. Palmer*, 28 N. Y. 271; *Cheeseborough v. Millard*, 1 Johns. Ch. (N. Y.) 409; *King v. Baldwin*, 2 Johns. Ch. (N. Y.) 554; *Hayes v. Ward*, 4 Johns. Ch. (N. Y.) 123; *Clason v. Morris*, 10 Johns. (N. Y.) 524; *Ottoman v. Moak*, 3 Sandf. Ch. (N. Y.) 431; *Towe v. Newbold*, 4 Jones Eq. (Nor. Car.) 212; *Smith v. McLeod*, 3 Ired. Eq. (Nor. Car.) 390; *Heart v. Bryan*, 2 Dev. Eq. (Nor. Car.) 147; *Cochran v. Shields*, 2 Grant's Cas. (Penn.) 437; *Ware, ex parte*, 5 Rich. Eq. (So. Car.) 473; *Schultz v. Carter*, Speers Eq. (So. Car.) 534; *Bittick v. Wilkins*, 7 Heisk. (Tenn.) 307; *Wade v. Green*, 3 Humph. (Tenn.) 547;

Henry v. Compton, 2 Head (Tenn.), 549; *Scanland v. Settle*, Meigs (Tenn.), 169; *Willson v. Phillips*, 27 Tex. 543; *James v. Jacques*, 26 Tex. 320; *Mitchell v. De Witt*, 25 Tex. Sup. 180; *Leake v. Ferguson*, 2 Gratt. (Va.) 419; *Edmunds v. Venable*, 1 Patton & H. (Va.) 121; *McLung v. Beirne*, 10 Leigh (Va.), 394; *Miller v. Pendleton*, 4 Hen. & Munf. (Va.) 436.

¹ *Enders v. Brune*, 4 Randolph (Va.), 438.

² *Moore v. Bray*, 10 Penn. St. 519; *Holt v. Bodey*, 18 Penn. St. 207; *Neff v. Miller*, 8 Penn. St. 348; *Neff's Appeal*, 9 Watts & Serg. (Penn.) 36; *Ebenhardt's Appeal*, 8 Watts & Serg. (Penn.) 327; *Huston's Appeal*, 69 Penn. St. 485 (overruling *Harrisburg Bank v. German*, 3 Penn. St. 300); *Davenport v. Hardeman*, 5 Ga. 580; *Morris v. Evans*, 2 B. Mon. (Ky.) 84; *Neimcewicz v. Gabn*, 3 Paige (N. Y.), 614; *York v. Landis*, 65 Nor. Car. 535; *Watts v. Kinney*, 3 Leigh (Va.), 272; *McDaniels v. Flower Brook Mannfg. Co.*, 22 Vt. 274.

³ *Beaver v. Slanker*, 94 Ills. 175.

his claim against the latter to the extent of the value of the property so surrendered.¹ The surety is discharged, at least *pro tanto*, whenever, from the affirmative act of the creditor, the substitution of the surety to the rights and securities of the creditor can no longer be operated in favor of the surety.² As was said by Lord Brougham,³ "The rule is undoubted, and it is one founded on the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of the creditor, and have all the rights which he has, for the purpose of obtaining his reimbursement. It is hardly possible to put this right of substitution too high; and the right results more from equity than from contract or *quasi* contract, unless in so far as the known equity may be supposed to be imported into any transaction, and so to raise a contract by implication. The doctrine of the court in this respect was luminously expounded in the argument of Sir

¹ *Guild v. Butler*, 127 Mass. 336; 44 N. Y. 453; *Hubbell v. Carpenter*, *Baker v. Briggs*, 8 Pick. (Mass.) 122; 5 Barb. (N. Y.) 520; *Loomer v. Cummings v. Little*, 45 Maine, 183; *Wheelwright*, 3 Sandf. Ch. (N. Y.) 135; *Commonwealth v. Miller*, 8 Serg. & R. (Penn.) 452; *Hereford v. Chase*, 1 Rob. (La.) 212; *Kennedy v. Brosiere*, 16 La. Ann. 445; *Stiwell v. Burdell*, 18 La. Ann. 17; *Jenkins v. McNeese*, 34 Tex. 189; *Nelson v. Williams*, 2 Dev. & Bat. Eq. (Nor. Car.) 118; *Cooper v. Wilcox*, 2 Dev. & Bat. Eq. (Nor. Car.) 90; *Lumsden v. Leonard*, 55 Ga. 374; *Turner v. McCarter*, 42 Ga. 491; *Winston v. Yeagin*, 50 Ala. 340; *Cullum v. Emanuel*, 1 Ala. 23; *Scanland v. Settle*, *Meigs* (Tenn.), 169; *Hall v. Hoxsey*, 84 Ills. 616; *Rogers v. School Trustees*, 46 Ills. 428; *Payne v. Commercial Bank*, 6 Sm. & M. (Miss.) 24; *Middleton v. Marshalltown Bank*, 40 Iowa, 29; *Salem County v. Buie*, 65 Mo. 63.

² *Kinnaird v. Webster*, 10 Ch. Div. 139; *American Bank v. Baker*, 4 Met. (Mass.) 164; *City Bank v. Young*, 43 N. H. 457; *Hurd v. Spencer*, 40 Vt. 581; *Chester v. Kingston Bank*, 16 N. Y. 336; *Black River Bank v. Page*,

³ In *Hodgson v. Shaw*, 3 Mylne & K. 183.

Samuel Romilly ;¹ and Lord Eldon, in giving judgment,¹ sanctioned the exposition by his full approval. A surety will be entitled to every remedy which the creditor has against the principal debtor; to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety, having a right to have those securities transferred to him, though there was no stipulation for that, and to avail himself of all those securities against the debtor."

§ 87. **It is an Equitable Assignment to the Surety.** — So soon as the surety pays the debt of his principal, there arises in his favor an equity to have the securities held by the creditor for his demand turned over to him, and to avail himself of them as fully as the creditor could have done.² For the purposes of his indemnification he is entitled to be subrogated to all the rights, remedies, and securities of the creditor, and is allowed to enforce all the creditor's rights and remedies and means of payment against the principal.³ Payment by a surety, although it discharges the debt and extinguishes all the securities, so far as it concerns the creditor, does not have that effect as between the principal and the surety; ⁴ as to these, it is in the nature of a purchase by the surety from the creditor. It operates in equity as an assignment of the debt and the securities to the surety.⁵ The right of subrogation and the equitable assign-

¹ In *Craythorne v. Swinburne*, 14 Ves. 160.

² *Lowndes v. Chisholm*, 2 McCord Eq. (So. Car.) 455; *Klopp v. Lebanon Bank*, 46 Penn. St. 88; *Murray v. Catlett*, 4 Green (Iowa), 108; *Jacques v. Fackney*, 64 Ills. 87; *Smith v. Schneider*, 23 Mo. 447; *Loughridge v. Bowland*, 52 Miss. 546.

³ *Darst v. Bates*, 95 Ills. 493; *Conway v. Strong*, 24 Miss. 665; *Chrisman v. Harman*, 29 Gratt. (Va.) 494; *Cullum v. Emanuel*, 1 Ala. 23;

Dunlap v. O'Bannon, 5 B. Mon. (Ky.) 393; *Storms v. Storms*, 3 Bush (Ky.), 77; *Ghiselin v. Fergusson*, 4 Harr. & Johns. (Md.) 522; *Cottrell's Appeal*, 23 Penn. St. 294.

⁴ *Postea*, §§ 135 *et seq.*

⁵ *Magee v. Leggett*, 48 Miss. 139; *Dinkins v. Bailey*, 23 Miss. 284; *McCormick v. Irwin*, 35 Penn. St. 111; *Jones v. Tinch*, 15 Ind. 308; *Deaderick, J.*, in *Bittick v. Wilkins*, 7 Heisk. (Tenn.) 307.

ment relate back to the time of entering into the contract of suretyship, as against the principal and those claiming under him.¹ If a question is made whether the acts of the surety have been such as to keep the security on foot, the court, in the absence of evidence to the contrary, will presume that they were done with that intention which is most for the benefit of the party doing them.² Thus, the guarantor of a promissory note will be subrogated to the rights of the holder thereof to whom he has made payment.³ And since the surety is entitled to the benefit of all the securities for the debt, all persons taking any of them, either from the principal debtor or from the creditor with notice of the facts and of the surety's responsibilities, are bound in equity to hold them for his benefit.⁴ Nor will it make any difference that the surety, in entering upon the obligation, did not rely upon the security, or even know of its existence.⁵ Any collateral security received by the creditor from the principal debtor will inure to the benefit of the surety.⁶

§ 88. **Surety subrogated to Priority of Creditor.** — Accordingly, it has generally been held that, where the government is entitled to priority in the payment of a debt, a surety for the debtor will, upon paying the debt to the government, be subrogated to its priority;⁷ and he can enforce this right in a court of equity.⁸ This doctrine has been applied to the case of a surety upon a custom-house bond for the payment of duties

¹ *McArthur v. Martin*, 23 Minn. (So. Car.) 164; *Drew v. Lockett*, 32 74; *Wood v. Lake*, 62 Ala. 489. Beav. 499.

² *McArthur v. Martin*, 23 Minn. 74; *Dempsey v. Bush*, 18 Ohio St. 440.

³ *Gossin v. Brown*, 11 Penn. St. 376; *Rittenhouse v. Levering*, 6 Watts & Serg. (Penn.) 190; *Kleiser v. Scott*, 6 Dana (Ky.), 137. ⁴ *Kirkman v. Bank of America*, 2 Coldw. (Tenn.) 397; *Newton v. Chorlton*, 10 Hare, 646.

⁵ *Babcock v. Blanchard*, 86 Ills. 165. ⁶ *Hunter v. United States*, 5 Peters, 173, 182; *Richeson v. Crawford*, 94 Ills. 165; *Regina v. Salter*, 1 Hurls. & Norm. 274.

⁷ *Atwood v. Vincent*, 17 Conn. 575; *Norton v. Soule*, 2 Greenl. (Me.) 341; *Greene v. Ferrie*, 1 Desaus. Eq. ⁸ *Miller v. Woodward*, 8 Mo. 169.

to the United States,¹ even in cases in which the statutes did not provide for such substitution, the owner of the goods not having been a party to the bond,² and also in favor of two of the sureties of a United States collector who had made default and died insolvent, after their payment of his indebtedness to the United States, as against their co-sureties.³ But where the principal debtor is still further indebted to the government, the surety, although he has paid all for which he was bound, cannot be subrogated to this right of priority in competition with the government.⁴ And the claim of sureties upon bonds given to the United States for the payment of duties upon imported goods, which they have since paid, cannot be made to yield to the claim of a purchaser of these goods from the importer, although such purchaser has lost the goods by reason of an unlawful sale of them for the same duties by the collector.⁵

§ 89. **Sureties of a Trustee subrogated to the Rights of the Cestuis que Trustent.**—Where the sureties of a trustee have been compelled to answer for his breach of trust, they are subrogated to the rights of both the trustee and the *cestui que trust* against those who have participated in his wrongful acts.⁶ The guardian of an infant having wrongfully assigned a bond payable to him in his official capacity, and the sureties upon his official bond having made up the loss, it was held that they could recover from the assignee of the bond, just as the ward could have done.⁷ The sureties of a deceased guardian who have satisfied the ward for his default will be subrogated to

¹ *Dias v. Bouchaud*, 10 Paige (N. Y.), 445; *West v. Creditors*, 3 La. Ann. 529.

² *Enders v. Bruue*, 4 Rand. (Va.) 438. And see *Prather v. Johnson*, 3 Harr. & Johns. (Md.) 487.

³ *Robertson v. Triggs*, 32 Gratt. (Va.) 76.

⁴ *Queen v. O'Callaghan*, 1 Irish Eq. 439.

⁵ *Dias v. Bouchaud*, 10 Paige (N. Y.), 445.

⁶ *Edmunds v. Venable*, 1 Patton & H. (Va.) 121; *Rhame v. Lewis*, 13 Rich. Eq. (So. Car.) 270; *McNeil v. Morrow*, Rich. Eq. Cas. (So. Car.) 172.

⁷ *Powell v. Jones*, 1 Ired. Eq. (Nor. Car.) 337; *Fox v. Alexander*, 1 Ired. Eq. (Nor. Car.) 340.

the rights and remedies of the ward against the guardian's estate.¹ The sureties upon the official bond of an insolvent clerk of court will in equity be entitled, upon a breach of trust by their principal, to all the remedies and securities that were in the power of the *cestuis que trustent* or the creditors against one who participated in the breach of trust, and this even before they have paid over the amount that was misapplied by their principal.² If an administrator, being about to leave the State, deposits the assets of the estate with a stranger, in trust to pay the same to the next of kin of the intestate, the sureties of the administrator, against whom recoveries have been had by any of the next of kin, have a right to call upon this stranger for an account of the assets so received by him, and to be subrogated against him to the rights of such of the next of kin as have held the sureties to responsibility.³ And although it has been decided in Massachusetts that a surety upon an administrator's probate bond, who has been obliged to pay a judgment recovered by the heirs at law upon the bond, and has taken an assignment of all their rights in the estate and all claims of theirs therefor, cannot maintain a suit against an agent of the administrator having in his hands moneys belonging to the estate, yet this decision was put upon the ground that the heirs could not themselves have maintained such an action, but were restricted to their remedy upon the administrator's bond.⁴ A surety upon an administrator's bond who has paid one-half of a judgment recovered by a creditor of the intestate against the administrator will not be subrogated to the rights of the creditor whom he has paid, but to those of the administrator for whom he has made the payment.⁵

§ 90. **Sureties of a Sheriff subrogated to Rights which they have satisfied for him.**—The sureties of a sheriff, who have

¹ *Gilbert v. Neely*, 35 Ark. 24.

⁴ *Winslow v. Otis*, 5 Gray (Mass.).

² *Bunting v. Ricks*, 2 Dev. & Bat. 360.

Eq. (Nor. Car.) 130.

⁵ *Clark v. Williams*, 70 Nor. Car.

³ *Kennedy v. Pickens*, 3 Ired. Eq. 679.
(Nor. Car.) 147.

been compelled to pay a judgment recovered against him by the owner of property which he had taken on a judgment against a third party, and had turned over to the plaintiff in the execution, have been allowed to recover the value of such property against that plaintiff; the court saying that it was equitable to treat the sureties who had satisfied the owner as substituted to his cause of action against the plaintiff.¹ So if the sureties of a sheriff have to pay the money for the default of his deputy in failing to take a bail-bond from the defendant in a writ, they are entitled in equity to be subrogated to the rights of the sheriff against such deputy, and also to resort to a fund which the deputy had obtained from such defendant to indemnify himself against the consequences of the same default.² They could also resort to the sureties in a bond given by the deputy to the sheriff to secure the latter against the deputy's delinquencies in office.³ The sureties of a sheriff who have been compelled, by reason of his default, to pay to the owners of land the amount for which he had sold the land in partition proceedings, will be subrogated to the rights of the sheriff in a note which he took for the price of the land from the purchaser at his sale.⁴ If the sureties of a sheriff have been compelled, through his neglect to serve an execution committed to him, to pay the amount of such execution to the creditor therein, these sureties will be subrogated to the rights of the creditor against the original defendants in the execution,⁵ just as the sheriff would have been if he had himself made the payment.⁶

§ 91. **Subrogation of a Debtor's Surety against a Sheriff.** — Where a plaintiff recovered judgment and issued execution against both principal and surety, and the sheriff collected the amount of the judgment from the principal debtor, but only

¹ *Skiff v. Cross*, 21 Iowa, 459.

² *Blalock v. Peak*, 3 Jones Eq. (Nor. Car.) 323.

³ *Brinson v. Thomas*, 2 Jones Eq. (Nor. Car.) 414.

⁴ *Sweet v. Jeffries*, 48 Mo. 279.

⁵ *Bittick v. Wilkins*, 7 Heisk. (Tenn.) 307.

⁶ *Antea*, § 7.

paid over a part thereof to the plaintiff, and the surety paid the balance of the judgment to the plaintiff, neither of them then knowing that the sheriff had the funds in his hands, this was held to operate the subrogation of the surety to the plaintiff's claim against the sheriff for such funds.¹ But if the liability of the sheriff had been for a mere default, in not collecting and returning the execution, under such circumstances that the sheriff himself, upon making compensation for his default, would have been entitled to be subrogated to the rights of the creditor against all the defendants in the execution,² then a payment by the surety would not have entitled him to any redress against the sheriff,³ unless the sheriff's neglect had resulted in a loss to the surety for which he could not obtain satisfaction from his principal.⁴

§ 92. **Surety subrogated to Corporation's Lien upon the Stock of its Shareholders.** — When corporations have a lien upon the stock of their shareholders for the payment of debts due from the latter to the corporations, a surety paying such indebtedness will be subrogated to this lien.⁵ The surety's equitable right attaches the instant the lien of the corporation commences, and is consummated by his payment of the indebtedness for which he is bound as surety.⁶ If, however, the corporation, though having the power to create such a lien, has never exercised its option to do so, then no lien exists, and there is nothing to which the surety can be subrogated.⁷

§ 93. **Surety entitled to be subrogated, though not in Privity with his Principal.** — A owed a debt to B, who was indebted to C. At the request of B, and in pursuance of an arrangement between B and C, A gave a bond and mortgage for his debt

¹ *Merryman v. State*, 5 Harr. & Johns. (Md.) 423; *Bellows v. Allen*, 23 (Vt.) 169.

² *Antea*, § 7.

³ *Bellows v. Allen*, 23 Vt. 169.

⁴ *Pennsylvania Bank v. Potius*, 10 Watts (Penn.), 148, 152. See *Bough-ton v. Orleans Bank*, 2 Barb. Ch. (N.Y.) 458.

⁵ *Klopp v. Lebanon Bank*, 46 Penn. St. 88; *Young v. Vough*, 23 N. J. Eq. 325.

⁶ *Klopp v. Lebanon Bank*, 46 Penn. St. 88.

⁷ *Perrine v. Mobile Ins. Co.*, 22 Ala. 575.

directly to C. A third party then, at the solicitation of B, but without any request from the mortgagor, guaranteed the payment of the bond, and was compelled to pay it upon his guaranty; and it was held that he was entitled to be subrogated to the benefit of the mortgage for his reimbursement, although he had no remedy at law against the principal debtor; for the right of a surety, upon his payment of the debt, to be subrogated to the securities held by the creditor for the debt does not rest upon contract or privity, but depends upon principles of natural justice and equity;¹ and it would have been no defence to the surety, in an action against him by the creditor, that he became surety without the privity of the principal.² So a surety for a part of the debt, as he cannot be subrogated to the creditor's securities until the whole debt is paid,³ may pay the whole debt, including the part for which he is not liable, and enforce the creditor's securities to reimburse him for his full payment.⁴

§ 94. **Surety upon a Bond entitled to the Benefit of a Prior Bond for the same Debt.**—Where a bond has been given by two debtors for the payment of a debt, and after the death of one of them the other gives a new bond with a surety for a part of the demand due upon the first bond, such surety, after paying the amount of the second bond, and taking an assignment of the first bond, may enforce it against the estate of the deceased debtor.⁵

§ 95. **Surety subrogated to the Benefit of an Agreement made by his Creditor.**—A surety has an equity to be substituted to the benefits obtained by the creditor under an agreement made with other creditors of the same debtor, allowing him to share in the proceeds of property of the debtor upon which he would otherwise have had no claim.⁶ If a vendor of

¹ *Matthews v. Aikin*, 1 N. Y. 595.

⁵ *Hodgson v. Shaw*, 3 Mylne & K.

² *Hughes v. Littlefield*, 18 Maine, 183.

400.

⁶ *Person v. Perry*, 70 Nor. Car.

³ *Postea*, § 118.

697.

⁴ *Gerber v. Sharp*, 72 Ind. 553.

land has authorized his vendee to bring suit against an adverse occupant of the premises, agreeing to allow as a part payment of the purchase-money such expenses as the vendee might incur in the prosecution of the suit, sureties on a bond given by the vendee for the prosecution of the suit to the defendant therein will, upon being held on their bond, be subrogated to the rights of their principal, the vendee, against the vendor under this agreement.¹

§ 96. **Surety of a Purchaser subrogated to Vendor's Right of Rescission.** — Where the seller of property has the right to rescind the sale for the non-payment of the price, a surety of the purchaser, upon being compelled to pay the price, will be subrogated to this right.² After the sureties have been compelled to pay the debt, and have established their claim against their principal, they will be subrogated to all the creditor's rights in equity, and may maintain a bill to set aside any conveyance which the creditor could have avoided.³ But the indorser of a note given by the master of a steamboat for stores and supplies furnished to the boat does not, by paying the note, become subrogated to the right of the party furnishing the supplies to have a lien on the boat.⁴ The object of the note was to prevent the lien; and the indorser's remedy is on the note itself.

§ 97. **Surety of a Purchaser subrogated to a Title or Lien retained by the Vendor.** — A surety for the price of property purchased, the title to the property being retained by the vendor as additional security for the payment of the price, has an equity, if he is compelled to pay the purchase-money, or a balance thereof after a partial payment by the purchaser, to resort to the property for his reimbursement.⁵ The vendors still

¹ American Land Co. v. Grady, 33 Ark. 550.

² Groves v. Steel, 2 La. Ann. 480; Torregano v. Seguiria, 14 Mart. N. S. (La.) 158.

³ Tatum v. Tatum, 1 Ired. Eq. (Nor. Car.) 113.

⁴ Hays v. Steamboat Columbus, 23 Mo. 232.

⁵ Smith v. Schneider, 23 Mo. 447; Arnold v. Hicks, 3 Ired. Eq. (Nor. Car.) 17; Barnes v. Morris, 4 Ired. Eq. (Nor. Car.) 22; Tuck v. Calvert, 33 Md. 209.

holding the legal title, and being entitled at their election to have the property sold for the payment of the purchase-money, the surety, on being held liable for the purchase-money, may be subrogated to this right.¹ And this right will not be destroyed by a subsequent sale and conveyance by the purchaser of his interest in the property.² Whenever the vendor of property, real or personal, retains a lien thereon for the payment of the purchase-money, a surety for the purchaser, who is held liable for the purchase-money, is entitled to be subrogated to this lien.³ So, if property is sold under a decree of court, the title being retained or a lien reserved upon the property for the purchase-money, a surety given by the purchaser for the price may be substituted to this lien upon the default of the purchaser, and may have the property sold for his relief, even before he has himself paid the price,⁴ and although the principal debtor has himself transferred his interest in the property to other persons.⁵ Though the surety cannot ordinarily be subrogated to the rights of the creditor against the principal debtor until he has actually paid the debt,⁶ yet, under such circumstances, the surety has been allowed to have the property resold for his own protection.⁷

§ 98. **Surety for Vendor subrogated to Equitable Rights of Vendee.**—A surety for the vendor to the vendee of property will, upon answering for the default of his principal, be subrogated in like manner to the equitable rights of the vendee against the vendor. Thus, where the vendor of land gave a bond with surety to the vendee, conditioned to make a title to

¹ *Ghiselin v. Fergusson*, 4 Harr. & J. (Md.) 522.

² *Fulkerson v. Brownlee*, 69 Mo. 371; *Kleiser v. Scott*, 6 Dana (Ky.), 137; *Smith v. Schneider*, 23 Mo. 447; *Ghiselin v. Fergusson*, 4 Harr. & J. (Md.) 522; *Egerton v. Alley*, 6 Ired. Eq. (Nor. Car.) 188; *Shoffner v. Fogleman*, Winston Eq. (Nor. Car.) 12.

^a *Burk v. Chrisman*, 3 B. Mon.

(Ky.) 50. But see *McNeill v. McNeill*, 36 Ala. 109.

⁴ *Henry v. Compton*, 2 Head (Tenn.), 549.

⁵ *Green v. Crockett*, 2 Dev. & Bat. Eq. (Nor. Car.) 390; *Polk v. Gallant*, 2 Dev. & Bat. Eq. (Nor. Car.) 395.

⁶ *Postea*, §§ 118, 127.

⁷ *Bradford v. Marvin*, 2 Fla. 463; *Petillo, in re*, 80 Nor. Car. 50; *Stenhouse v. Davis*, 82 Nor. Car. 432.

the land upon payment of the purchase-money, and before the purchase-money was all paid the land was sold on an execution against the vendor, who became insolvent, and thereupon the vendee sued the surety upon the bond, and recovered judgment against him for the purchase-money that had been paid, it was held that the surety could follow the land, and have remuneration out of it in the hands of the purchasers at the sheriff's sale for the amount that he had thus been compelled to pay.¹

§ 99. **Right of Vendor who becomes Surety for Vendee.** — A vendor of land took the purchaser's note for the price thereof, and gave a bond for title when the purchase-money should be paid. When half the purchase-money had been paid the vendee sold the land, giving a warranty deed thereof to a *bonâ fide* purchaser for value, who had no knowledge that the title was still in the original vendor. Afterwards, the vendor knowing of this conveyance, the original vendor and vendee made a verbal agreement that the vendee should pay the balance of his purchase-money by paying a debt of the vendor, giving his own note therefor with the vendor as a surety, and that, if the vendor as such surety should be compelled to pay this note, the purchase-money should again become due from the vendee to the vendor, and the vendor should still hold the legal title to the land as security therefor. The vendor was compelled to pay this note, and then evicted the new purchaser from the land, and held it himself under his legal title. The vendor then claimed the balance of the purchase-money from the vendee; and the vendee's purchaser claimed damages for the breach of the vendee's warranty. It was held that the making of the verbal agreement between the vendor and the vendee operated a payment of the purchase-money of the original sale, and that the vendor was not entitled to recover any balance thereof by reason of the contract of suretyship; but that having elected to rescind his contract of sale by resorting to his legal title and evicting his vendee's purchaser, and

¹ Freeman v. Meban, 2 Jones Eq. (Nor. Car.) 44.

having thus made the vendee liable in damages to such purchaser, he must refund to the vendee the half of the purchase-money which he had received.¹

§ 100. **Surety entitled to Funds held for the Debt in the Hands of his Principal.** — Where sureties have paid, or are held liable to pay, the debt of their principal, they are entitled in equity to the benefit of all funds and assets, so far as these can be specifically reached, which their principal held as specifically applicable to the debt which they have paid, and to have these funds and assets placed in such a position as to be made available for their protection.² A person taking any of such securities from the principal debtor, with notice of his responsibilities, is bound in equity to hold them for the indemnification of the sureties.³ Accordingly, where one who held a mortgage as administrator took a conveyance of the equity of redemption from the mortgagor to himself individually, it was held, since this conveyance only rendered the defeasible estate already vested in him as administrator an absolute estate, that an agreement by the legatees of the estate that he should hold the land in his own right, leaving his sureties liable for the balance due upon his account, could not be supported against the sureties, but that the latter could resort for their indemnity to the land, both in the hands of the administrator and of his grantee.⁴ Where one became surety in consequence of a promise by the principal debtor that certain bank stock should also be pledged for the payment of the debt, but the principal died before the transfer could be made, the execution of this agreement was enforced against his executor, although his estate was insolvent.⁵ Executors who have paid a debt for which their testator was liable merely as a surety for a residuary legatee will have a lien upon the legacy for their reimbursement superior to that of a mortgagee of the legacy.⁶ Where the note

¹ *Davis v. Smith*, 5 Ga. 274.

⁴ *Johnson v. Bartlett*, 17 Pick.

² *Shaw, C. J.*, in *Johnson v. Bartlett*, 17 Pick. (Mass.) 477, 488; *Lingle*

(Mass.) 477.

v. Cook, 32 Gratt. (Va.) 262.

⁵ *McCoy v. Wilson*, 58 Ind. 447.

⁶ *Willes v. Greenhill*, 29 Beav.

³ *Atwood v. Vincent*, 17 Conn. 575. 376.

of one who had died indebted to a bank was renewed by his executor as such with a surety, the surety, having paid the note, was substituted to the claim of the executor as well as of the bank against the assets of the estate; and the executor being in advance to the estate by reason of the note which the surety had paid, the amount thus due from the estate to the executor was ordered to be paid to the surety in preference to a subsequent assignee from the executor.¹ But in Alabama under similar circumstances it was held that as the claim of the creditor against the estate of the deceased principal was barred by the taking of the new note, and only the parties to the new note were liable upon it in their individual capacity, the surety upon the new note, when he was compelled to pay it, had no equity against the estate of the deceased principal, except to hold the interest therein of the parties to the new note.²

§ 101. **Surety may avail himself of his Principal's Right of Set-off or Defence.** — A surety, when sued upon his contract, may avail himself of his principal's right of set-off growing out of the same transaction.³ Thus, it is a good equitable defence to the surety, as to part of the amount claimed of him, that a dispute as to the consideration of the contract having arisen between the plaintiff and the defendant's principal, and the dispute having been referred to arbitration in accordance with the original agreement, this amount had been awarded to the defendant's principal, which the principal had offered before suit brought to set off against the present claim.⁴ So, when the payee of a note brought an action thereon for the benefit of a third person who had become its proprietor against a surety upon the note, and it appeared that the consideration of the note was the sale of a tract of land by the payee of the

¹ *Heart v. Bryan*, 2 Dev. Eq. v. *Newton*, 30 Wisc. 640; *Myers v. (Nor. Car.)* 147. State, 45 Ind. 160; *Waterman v.*

² *Brown v. Lang*, 4 Ala. 50.

Clark, 76 Ills. 423.

³ *Bechervaise v. Lewis*, L. R. 7 C. P. 372; *McDonald Manufacturing Co. v. Moran*, 52 Wisc. 203; *Hiner*

⁴ *Murphy v. Glass*, L. R. 2 P. C. 403.

note to the principal maker, and that at the time of the sale there was an unsatisfied judgment against the vendor, operating a lien upon the land, which judgment the principal had since discharged with the consent of the beneficial plaintiff, and upon the latter's promise to allow it as a credit upon the note, it was held that this promise to the principal inured also to the benefit of the surety, and operated a satisfaction of the note *pro tanto*.¹ The surety may as a general rule set up against the claim of the creditor any legal or equitable defence which would have been open to the principal.² But the surety's equity to avail himself of his principal's right of set-off against the creditor does not extend to distinct demands of the principal, not growing out of the same transaction,³ unless the principal is insolvent,⁴ or the principal has taken advantage of the set-off in a joint action against principal and surety.⁵ And this right of set-off is reciprocal to the creditor and the sureties as against the principal.⁶ But the surety cannot defend against the creditor by reason of the failure of the title to the property for the price of which he became surety without the authority of the principal; the latter may bind his surety as well as himself by waiving the defence of a defective title or a breach of warranty in the conveyance by which the debt was created.⁷ The surety is bound in the same manner and to the same extent as his principal; and if the latter is satisfied with his purchase, it cannot be rescinded by the surety for

¹ *Cole v. Justice*, 8 Ala. 793.

² *Baines v. Barnes*, 64 Ala. 375; *Jarratt v. Martin*, 70 Nor. Car. 459.

³ *Morgan v. Smith*, 70 N. Y. 537; *S. C. 7 Hun (N. Y.)*, 244; *Lasher v. Williamson*, 55 N. Y. 619; *Springer v. Dwyer*, 50 N. Y. 19; *Lewis v. McMillen*, 41 Barb. (N. Y.) 420; *Emory v. Baltz*, 22 Hun (N. Y.), 434; *Henry v. Daley*, 17 Hun (N. Y.), 210; *Putnam v. Schuyler*, 4 Hun (N. Y.), 166; *Vastine v. Dinan*, 42 Mo. 269.

⁴ *Coffin v. McLean*, 80 N. Y. 560;

Morgan v. Smith, *supra*; *Gillespie v.*

Torrance, 25 N. Y. 306.

⁵ *Himrod v. Baugh*, 85 Ills. 435; *Springer v. Dwyer*, 50 N. Y. 19; *Bathgate v. Haskin*, 59 N. Y. 533; *Harris v. Rivers*, 53 Ind. 216; *Wartman v. Yost*, 22 Gratt. (Va.) 595; *Mahurin v. Pearson*, 8 N. H. 539; *Crist v. Brindle*, 2 Rawle (Penn.), 121.

⁶ *Andrews v. Varrell*, 46 N. H. 17.

⁷ *Ross v. Woodville*, 4 Munf. (Va.) 324; *Henry v. Daley*, 17 Hun (N. Y.), 210.

a defect in the title which is given.¹ The surety upon a note may set up in bar of an action thereon against him a judgment previously rendered, in an action against the principal upon the same note, for the defendant, on the ground of the illegality of the obligation.² And the surety has been allowed to maintain a writ of error to reverse a judgment recovered against the principal which would have been conclusive upon the surety.³

§ 102. **The Surety is a Creditor of the Principal.**—When the principal debtor is bankrupt, the sureties, in respect of their liability, are regarded in equity as his creditors, and may retain any funds of the principal in their hands, even against a *bonâ fide* purchaser thereof for value without notice of their rights.⁴ The surety is regarded in equity as a creditor of his principal, and has all the privileges of a creditor.⁵ The surety is a creditor of the principal from the time of his signing the obligation by which he is bound,⁶ just as he is liable to the creditor from that time;⁷ though his equity to be subrogated to the securities held by the creditor does not become complete until his payment of the debt.⁸ Though the principal's liability to indemnify his surety is, previous to payment by the latter, merely contingent, it is nevertheless a debt, and will be embraced within the terms of a will made by the principal, charging his real estate with the payment of his debts.⁹ But when a surety is liable as such for several different debts of the same principal, the latter may assign a debt due to him from the surety for the security of any one of these debts that he

¹ *Lyon v. Leavitt*, 3 Ala. 430.

⁵ *Williams v. Washington*, 1 Dev.

² *Gill v. Morris*, 11 Heisk. (Tenn.) 614.

Eq. (Nor. Car.) 137.

⁶ *Scott v. Timberlake*, 83 Nor. Car.

³ *Lyon v. Tallmadge*, 14 Johns. 382.

(N. Y.) 501.

⁷ *McMillan v. Bull's Head Bank*, 32 Ind. 11.

⁴ *Reynolds, in re*, 16 N. B. R. 158; *McKnight v. Bradley*, 10 Rich. Eq. (So. Car.) 557; *Abbey v. Van Campen*, 1 Freem. Ch. (Miss.) 273; *Battle v. Hart*, 2 Dev. Eq. (Nor. Car.) 31.

⁸ *Loughridge v. Bowland*, 52 Miss. 546; *Choteau v. Jones*, 11 Ills. 300.

⁹ *Elwood v. Deifendorf*, 5 Barb. (N. Y.) 398.

may choose, if only it be equal in amount to the debt assigned.¹ And if the surety is privy to a deed of trust which includes as part of the fund assigned a demand due from him to his principal, the assignor, and, the deed being greatly to his advantage, makes no objection at the time to the insertion of his debt, he is taken to have waived for a compensation any equity he may have had against its being thus included in the trust fund so assigned.²

§ 103. **Surety does not lose this Right by agreeing to exonerate his Co-sureties.** — One of the sureties upon the note of a corporation, which was signed by several sureties, and was also secured to the creditor by a mortgage upon the property of the corporation, does not cease to be a surety, or lose his right of subrogation, as between himself and the corporation, by making an agreement with his co-sureties for a valuable consideration that he will himself pay such note; and, upon its payment by him, he will be subrogated to the rights of the mortgagee as fully as if no such agreement had been made, and may enforce the mortgage, both against the corporation and also against other creditors of the corporation whose liens attached since the execution of the mortgage.³ No private arrangement among the co-sureties, for the distribution of the burden of their joint liability among themselves, will affect their rights against their principal.⁴

§ 104. **One who has pledged his Property for the Debt of another entitled to Subrogation.** — One who secures the payment of another's debt by a charge or mortgage upon his own property is, upon his payment of the debt, entitled like any other surety to be subrogated to the benefit of the securities held by the creditor from the principal debtor;⁵ nor will this right be

¹ *Miller v. Cherry*, 4 Jones Eq. (Nor. Car.) 197.

² *Miller v. Cherry*, *supra*.

³ *McDaniels v. Flower Brook Manufg. Co.*, 22 Vt. 274.

⁴ *Water Power Co. v. Brown*, 23 Kans. 676.

⁵ *Lewis v. Palmer*, 28 N. Y. 271; *McNeale v. Reed*, 7 Irish Ch. 251; *Sheidle v. Weishlee*, 16 Penn. St. 134; *Woodward, J.*, in *Denny v. Lyon*, 38 Penn. St. 98.

affected by the fact that the charge upon the property of the surety was created by the same instrument by which the property of the principal was mortgaged to the creditor, and that this instrument provided that, upon payment by either principal or surety, the creditor should reconvey both the charge of the surety and the mortgaged lands of the principal, to be held upon the same uses as before the execution of the instrument.¹ If a wife becomes a surety for her husband by the creation of a valid lien upon her own estate for the payment of his debt, she will be entitled to the same equitable rights as would be enjoyed by any other surety,² and will be subrogated to the rights of the creditor against her husband's property, even in the hands of a *bonâ fide* purchaser from him, who, but for his own negligence, would have been aware of her rights.³ As against her husband, she is entitled in equity to have his property first applied to the payment of the debt; and this right will pass to her grantees.⁴

§ 105. **Extent to which Subrogation will be carried.**—The subrogation of a surety will not be carried further than is necessary for his indemnity; if he buys up the security at a discount, or makes his payment in a depreciated currency, he can enforce it only for what it cost him.⁵ The extent to which the remedy will be carried will sometimes depend upon circum-

¹ *McNeale v. Reed*, 7 Irish Ch. 251; *Vartie v. Underwood*, 18 Barb. (N. Y.) 561.

² *Neimcewicz v. Gahn*, 3 Paige (N. Y.), 614; *Gahn v. Neimcewicz*, 11 Wend. (N. Y.) 312; *Fitch v. Cotheal*, 2 Sandf. (N. Y.) Ch. 29; *Vartie v. Underwood*, 18 Barb. (N. Y.) 561; *Albion Bank v. Burns*, 46 N. Y. 170; *Smith v. Townsend*, 25 N. Y. 479; *Wolfe v. Banning*, 3 Minn. 202; *Van Horne v. Everson*, 13 Barb. (N. Y.) 526; *Spear v. Ward*, 20 Calif. 659, 674; *Hassy v. Wilke*, 55 Calif. 525.

³ *Carley v. Fox*, 38 Mich. 387.

⁴ *Erie Savings Bank v. Roop*, 80 N. Y. 591; *Medsker v. Parker*, 70 Ind. 509.

⁵ *Dinkgrave's Succession*, 31 La. Ann. 703; *Kendrick v. Forney*, 22 Gratt. (Va.) 748; *Eaton v. Lambert*, 1 Nebraska, 339; *Martindale v. Brock*, 41 Md. 571; *Hall v. Cresswell*, 12 Gill & J. (Md.) 36; *Butler v. Butler*, 8 W. Va. 674; *Feamster v. Withrow*, 9 W. Va. 296; *Jordan v. Adams*, 2 English (Ark.), 348; *Crozier v. Grayson*, 4 J. J. Marsh. (Ky.) 514; *Miles v. Bacon*, 4 J. J. Marsh. (Ky.) 457; *Bonney v. Seely*, 2 Wend. (N. Y.) 481.

stances. After a surety had been subrogated to the rights of a land-owner to whom he had been compelled to pay the debt of his principal for land which his principal, a railroad company, had taken under the right of eminent domain, yet the surety was not allowed to stop the use of the land for the running of trains, as the creditor might have done, until he was repaid, because the court saw that this could be of no benefit to him, the company being insolvent and in the hands of a receiver, and the road being operated by a trustee merely for the accommodation of the public, and with a view to a more advantageous sale on foreclosure;¹ for equity will not do that which would be of no benefit to the party asking it, but merely a hardship to the party sought to be coerced.² A surety in a bond given in admiralty proceedings who has been compelled to pay the amount of a decree will be subrogated to the rights of the libellant against his principal, but not to the lien upon the vessel which was destroyed by the bond.³ And a surety who has paid the joint note of his principal and himself cannot reissue it, so as to bind any one but himself, without the consent of his principal.⁴

§ 106. **Surety of Surety may be subrogated; how far.**—A surety of a surety, who has paid and discharged the principal obligation, has the same equity of subrogation to the securities and remedies of the creditor as belonged to the surety for whom he was bound.⁵ A joint judgment having been recovered against several, one of them, who was originally only a surety, was taken on the execution, and gave a bond with a new surety to obtain his release; and it was held that this new surety, having been compelled to pay the debt, was entitled to be subrogated to the creditor's remedies against the land of

¹ Hewitt, *in re*, 25 N. J. Eq. 210.

² Joliet & Chicago R. R. Co. v. Healy, 94 Ills. 416.

³ The T. P. Leathers, 1 Newb. (Adm.) 432.

⁴ Hopkins v. Farwell, 32 N. H. 425.

⁵ Rittenhouse v. Levering, 6 Watts & Serg. (Penn.) 190; McDaniels v. Flower Brook Manufg. Co., 22 Vt. 274; Elwood v. Deifendorf, 5 Barb. (N. Y.) 398.

the original principal, although this land had been sold by the principal, and had come into the hands of a *bond fide* purchaser for value without notice of the circumstances, before the service of the execution upon the original surety.¹ But the surety of a surety who has been compelled to pay the creditor cannot be subrogated to the place of the creditor for the purpose of enforcing payment from the principal, if the latter has already paid his immediate surety.² The immediate surety can recover of the principal where the debt has been paid by his own surety, treating the payment as made by himself through the latter as his agent,³ where the latter holds the immediate surety for his reimbursement.³

§ 107. **How far Creditors of the Surety may be subrogated.**

—Where the lands of a surety have been taken for the debt of the principal, though the subsequent judgment-creditors of the surety, who have thus lost the benefit of their lien upon his lands, have an equity to be subrogated to the lien of the judgment against the principal, to the extent to which they have been deprived of the proceeds of the surety's lands by reason of the prior judgment against principal and surety,⁴ yet this equity depends entirely upon the rights of the surety against the principal, and is limited to the balance of general accounts between the principal and the surety.⁵ But the claim of a creditor of the surety, such creditor having been deprived of the opportunity to secure the payment of his demand by the surety's property having been taken to pay the principal's debt, will be preferred to that of an assignee of the surety, whose assignment was made after the right of the creditor had accrued.⁶

§ 108. **Creditor cannot discharge Security for his own Benefit after Payment by Surety.** — An indorser of a note which is

¹ *Leake v. Ferguson*, 2 Gratt. (Va.) 419.

⁴ *Huston's Appeal*, 69 Penn. St. 485.

² *New York Bank v. Fletcher*, 5 Wend. (N. Y.) 85.

⁵ *Neff v. Miller*, 8 Penn. St. 347.

³ *Hoyt v. Wilkinson*, 10 Pick. (Mass.) 31.

⁶ *Erb's Appeal*, 2 Penrose & Watts (Penn.), 296.

also secured by a mortgage is entitled to have the proceeds of the mortgaged premises applied to the payment of the note for his relief;¹ and if in such a case the creditor, after receiving payment from the surety, cancels the mortgage without the surety's consent, so as to leave the land subject to the lien of the judgment for another debt which the creditor holds against the principal debtor, and levies his execution under this judgment upon the same land, the claim of the surety to have reimbursement out of the land will have priority over the creditor's judgment-lien.² The surety's right of subrogation is superior to the creditor's claim to hold the security for another debt, not covered by the agreement.³ And the surety on an injunction bond for the second indorser of a negotiable note who has been compelled to pay the note is entitled to a recourse against the first indorser to recover the amount which he has thus paid.⁴

§ 109. **Instances of the Application of the Doctrine of Subrogation for the Protection of Sureties.** — Several parties having united in the purchase of land, and given their joint bonds for each one's share of the purchase-money to one of their number, in whom the legal title to the land was vested as their trustee, and one of them having failed to pay his share of the purchase-money, the sureties on his bond, who were his associates in the original purchase, paid it for him; and thereupon it was held that an equitable title to his share in the land became vested in them, and that, until they were fully reimbursed for their payment of his share of the purchase-money, neither he nor those claiming under him could demand of the trustee a conveyance of his share or a declaration of trust in his favor.⁵ A trustee appointed by a court of chancery to sell certain land sold the same, and took the purchaser's bond with a

¹ *Fowler v. Scully*, 72 Penn. St. 456; *Woods v. Pittsburg Bank*, 83 Penn. St. 57.

² *Ottawa Bank v. Dudgeon*, 65 Ills. 11.

³ *Perry v. Miller*, 54 Iowa, 277.

⁴ *Chrisman v. Harman*, 29 Gratt. (Va.) 494.

⁵ *Deitzler v. Mishler*, 37 Penn. St. 82.

surety for the payment of the purchase-money, with the agreement that the land should not be conveyed until the purchase-money was paid. This purchaser soon after sold the land, for the same sum that he had agreed to pay to the trustee for it, to a sub-purchaser, who, with full knowledge that the trustee had not been satisfied, paid to him the whole sum that he had agreed to pay for the land, and received from him an assignment of a claim of his against the owner of the land, which it was thought would be more than sufficient to pay for the land. But the estate turned out to be insolvent; and the dividend upon this claim was not sufficient to pay the purchase-money to the trustee, who accordingly withheld the conveyance from the sub-purchaser, to whom he was ordered by the court to convey the property upon the purchase-money being paid, and sued the surety on the bond of the original purchaser, and recovered a judgment against him for the unpaid portion of the purchase-money. The surety then claimed that what he was thus compelled to pay should be charged for his reimbursement upon the land in the hands of the sub-purchaser; and it was held that, unless this sub-purchaser should pay to the surety the amount of his payment within a limited time, the land, or so much of it as might be necessary, should be sold to raise that amount; for the sub-purchaser could not by his purchase put the surety for the original purchase-money in a worse position than he would otherwise have occupied.¹ A tract of land was sold three times by the successive purchasers thereof, the original vendor retaining the title, and reserving a lien on the land, as well as taking a bond with sureties for the payment of the purchase-money. Under these circumstances, one of these sureties advised a party to buy the land, but gave him no intimation as to the lien. The court held, that, although this advice and concealment might estop that surety from asserting any equity for his own benefit, to the prejudice of the party who purchased it upon his advice, it could have

¹ *Ghiselin v. Fergusson*, 4 Harr. & Johns. (Md.) 522.

no effect upon the rights of the first vendor, and, the purchase-money having remained unpaid upon each successive sale, that the land might be sold under the first lien, to which the sureties, who had paid the debt secured thereby, were subrogated.¹ But where the vendor had given a full title to the land sold, and had taken from the vendee a bond with two sureties for the payment of the purchase-money, it was held, upon the insolvency and death of the vendee and one of the sureties, and after a sale of the land by a devisee of the vendee to a purchaser with notice of the circumstances, that there was no lien upon which the other surety could hold the land for his indemnification upon the bond.²

§ 110. **Surety's Right of Subrogation may be lost by his Waiver.** — The right of a surety as such to be subrogated to the benefit of the securities and remedies held by the creditor against the principal debtor may be lost by the surety's waiver. Where one who claimed to be a surety had for eight years allowed himself to be held out as the principal debtor, and other rights had in the mean time accrued against the real principal, it was held to be too late for him then to claim to be subrogated as a surety to the prejudice of those rights.³ A year's delay in a similar case has been fatal to the rights of the surety, other liens having in the mean time attached upon the estate which the surety desired to hold.⁴ Indemnity received by the surety from a stranger will be regarded as cumulative to the rights which the surety already possesses.⁵ One who is manifestly a surety will not be deprived of the benefit of subrogation to a mortgage-security held by the creditor, merely because he took other security from the principal, and did not ask for an assignment of the mortgage immediately upon his payment of the debt which it secured.⁶ But if the

¹ Kleiser v. Scott, 6 Dana (Ky.), 137.

² Miller v. Miller, Phillips Eq. (Nor. Car.) 85.

³ Goswiler's Estate, 3 Pen. & Watts (Penn.), 200.

⁴ Gring's Appeal, 89 Penn. St. 336.

⁵ Wesley Church v. Moore, 10 Penn. St. 273.

⁶ Gossin v. Brown, 11 Penn. St. 527.

rights of other parties have accrued, the case will be different. Thus, if the vendor of land has a lien thereon for the price, a surety of the vendor who pays the price will not be subrogated to this lien, if he has taken other security from the vendee for his protection, and has without objection allowed the vendee to sell the land to another purchaser, although his security afterwards turns out to be insufficient.¹ And if, after a surety for two principals has paid the debt, he takes from one of the principals a security for his reimbursement, he thereby waives his right to the benefit of a security which had previously been given by the other principal to the creditor.² When one who seeks to be subrogated has the means of reimbursement in his own hands, and refuses or neglects to make due application thereof, he cannot be allowed to come upon another fund by way of subrogation.³ Where a bill in equity *quia timet* was filed for subrogation against persons who might be ultimately liable, the ground of action being for bonds given more than twenty years before the suit was brought, it was held that the complainants had lost their right to relief in equity by their laches in negligently lying by until, by reason of the lapse of time, there could be no safe determination of the matters in controversy, and that a court of equity, in exercising its discretion in such a case, need not be satisfied that the original claim was unjust.⁴ And just as the surety could not recover from his principal upon his voluntary payment of the debt after it had become extinguished by the statute of limitations,⁵ so he will be taken to have waived his privilege of subrogation, unless he claims it before his remedy at law against his principal is barred by lapse of time.⁶ But a surety who has

¹ *Henley v. Stemmons*, 4 B. Mon. (Ky.) 131.

² *Cornwell's Appeal*, 7 Watts & Serg. (Penn.) 305.

³ *Bell, J.*, in *Neff v. Miller*, 8 Penn. St. 351.

⁴ *Smith v. Thompson*, 7 Gratt. (Va.) 112.

⁵ *Randolph v. Randolph*, 3 Rand. (Va.) 490; *Hatchett v. Pegram*, 21 La. Ann. 722.

⁶ *Rittenhouse v. Levering*, 6 Watts & Serg. (Penn.) 190; *Fink v. Mahaffy*, 8 Watts (Penn.), 384; *Joyce v. Joyce*, 1 Bush (Ky.), 474. See *Rucks v. Taylor*, 49 Miss. 552.

unsuccessfully attacked for alleged fraud an assignment made by his principal, the benefits of which have been accepted by the creditor, is not thereby estopped from asserting his right of subrogation to the creditor as to these benefits.¹ Nor is it necessary to the surety's subrogation that his payment should have been coerced by an execution; his payment, though voluntarily made, will be regarded as compulsory whenever it could have been enforced.²

§ 111. **Surety's Right of Subrogation subject to Creditor's Rights.**—The surety's right of subrogation to the securities held by the creditor cannot be enforced to the prejudice of an intervening charge taken by the creditor from the principal debtor in ignorance of the suretyship. Thus, where A and B had given to a creditor their joint and several note, secured by a mortgage of their respective estates, and afterwards A gave a separate mortgage of his own estate to a creditor of his own, and this creditor afterwards took an assignment of the prior mortgage, and it then appeared that B had joined in the first note and mortgage merely as the surety of A, and B claimed that upon paying the first debt he was entitled to be subrogated to the rights of the mortgagee, and to hold the entire mortgaged premises for his indemnity, it was held that, before B could claim the rights of a surety against A's creditor, he must show that the latter knew, or had the means of knowing, of the suretyship; and the court said that though a creditor cannot tack to an existing mortgage-debt a demand not secured by the mortgage, nor a subsequent mortgage to a prior one as against an intervening incumbrancer, yet a mortgagee may take another mortgage, which will be valid against an intervening incumbrance implied by equity, of which the mortgagee had neither actual nor constructive notice.³ But if the creditor had known that B was merely a surety, though it did not appear upon the face of the papers, that would have been suffi-

¹ *Motley v. Harris*, 1 Lea (Tenn.), 577.

² *McNeilly v. Cooksey*, 2 Lea (Tenn.), 39.

³ *Orvis v. Newell*, 17 Conn. 97.

cient.¹ Nor will a surety be subrogated to the rights and liens of the creditor so as to defeat an interest acquired and held by a third person, when that interest, though subordinate to the creditor's lien, is prior in date to the surety's undertaking.² Thus, when a debtor sells property which he had mortgaged for a debt, and subsequently having been sued for the debt, and judgment having been obtained against him, gives a surety for the judgment, who is afterwards compelled to pay it, this surety cannot be subrogated to the mortgage so as to defeat the purchaser's title, which accrued before the contract of suretyship was entered into.³ For subrogation is purely an equitable result; and the subrogation of the surety to the creditor's means of payment does not depend upon privity, but rests solely upon principles of justice and equity; and when such claim is contested, it rests upon facts to develop and determine the rights of the parties in interest.⁴

§ 112. **Surety indebted to his Principal not entitled to Subrogation against him.** — As the right of subrogation rests upon principles of pure equity, it will not be allowed to a surety who is himself indebted to his principal, against whom he asks to be subrogated, without his first satisfying such debt.⁵ A judgment against principal and surety having been satisfied out of a sale of the surety's lands, the surplus proceeds in court were claimed by the principal debtor, who held the next judgment-lien on the surety's lands, and by subsequent judgment-creditors of the surety, who claimed, by virtue of the surety's payment, to be subrogated to the lien of the first judgment-creditor.⁶ The surety being also indebted on another account to the principal, and being insolvent, it was held that the payment made

¹ *Rogers v. School Trustees*, 46 Ills. 428. 241; *Fishback v. Bodman*, 14 Bush (Ky.), 117.

² *Farmers' Bank v. Sherley*, 12 Bush (Ky.), 304; *Fishback v. Bodman*, 14 Bush (Ky.), 117; *Johnson v. Morrison*, 5 B. Mon. (Ky.) 106. ⁴ *Eaton v. Hasty*, 6 Nebraska, 419.

⁵ *Coates's Appeal*, 7 Watts & Serg. (Penn.) 99. But see *Barney v. Grover*, 28 Vt. 391.

⁶ See *antea*, § 107.

³ *Patterson v. Pope*, 5 Dana (Ky.),

out of the surety's estate could not be set off against the principal's judgment, and that the principal had accordingly the first right to the surplus proceeds.¹ And if, as between principal and surety, the payment of the debt has been assumed by the original surety, the latter cannot in equity insist that the property of the former principal is primarily liable for the debt,² any more than he could recover against his principal at law after paying the debt.³

§ 113. **Surety's Right confined to the Contract for which he was Surety.** — As the surety's liability is limited to the express terms of his contract,⁴ so his right of subrogation is confined to the rights and securities of the contract for which he was surety.⁵ If one partner, though for the benefit of the partnership, executes a bond with a surety, this surety, on being compelled to pay the bond, does not thereby acquire any right of action against the other partners.⁶ One who is surety both for a firm and for an individual member of the firm has no right to apply upon the individual debt funds of the firm which may come into his hands; but if, having done so, he afterwards applies his own money to the payment of the firm debt, his rights will be the same as if he had paid the latter debt out of the partnership funds.⁷ If one who has bound himself as bail for the defendant, in an action against a shipmaster for the value of property lost through the neglect of the officers and crew, is compelled to pay the amount of the judgment against the master, though he will be subrogated to the benefit of the judgment so obtained and of its incidents, and will have the right of recourse against the owners of the ship which the master would have had if he had paid the judgment,

¹ Coates's Appeal, *supra*.

² Wright v. Crump, 25 Ind. 339.

³ Lewis v. Lewis, 92 Ills. 237.

⁴ Ward v. Stahl, 81 N. Y. 406.

⁵ Gerdone v. Gerdone, 70 Ind. 62;

Gunn v. Geary, 44 Mich. 615; Old v.

Chambliss, 3 La. Ann. 205; Trent v.

Calderwood, 2 La. Ann. 942.

⁶ Tom v. Goodrich, 2 Johns. (N.

Y.) 213; Bowman v. Blodgett, 2

Met. (Mass.) 308; Osborn v. Cun-

ningham, 4 Dev. & Bat. Law (Nor.

Car.), 423.

⁷ Downing v. Linville, 3 Bush

(Ky.), 472.

yet he will not be subrogated to the original cause of action against both the master and the owners of the ship.¹ Where a party executed a deed of trust to secure the acceptors of two bills of exchange accepted for his accommodation, and when one of these bills became due it was taken up by giving a new note with a new surety, the surety upon this new note, after paying it, was not allowed to share in the benefit of the original security.² If a note discounted at a bank for the benefit of a principal, with three sureties, is discharged at maturity with the proceeds of another note discounted with only two of the sureties, the third surety having died before the first note fell due, the estate of the latter will not be liable to contribute upon the insolvency of the principal and the payment of the new note by the sureties thereon, although when they executed the third note they supposed that the estate of the third surety would be liable thereon.³ If two executors have given a joint and several bond conditioned for their faithful administration, and after the death of one of them the survivor has committed waste of the estate, the sureties, after satisfying a judgment recovered upon the bond against the survivor and themselves for such waste, will have no right of action against the estate of the deceased executor, either for indemnity or contribution.⁴

§ 114. **Surety's Right to marshal Securities given to the same Creditor for Separate Debts.**—Where a debtor gives to his creditor collateral securities for the payment of the debt, and afterwards borrows of the same creditor a further sum of money, for the payment of which he gives also a surety, the surety, if called upon to pay the second debt, is entitled to the surplus of the securities over the amount needed to satisfy the first debt.⁵ The surety has a right, against the principal debtor or his representatives, to marshal the securities given

¹ *Tardy v. Allen*, 3 La. Ann. 66.

² *Houston v. Huntsville Bank*, 25 Ala. 250.

³ *Hutchings v. McCauley*, 2 Dev. & Bat. Eq. (Nor. Car.) 399.

⁴ *Brazer v. Clark*, 5 Pick. (Mass.) 96; *Towne v. Ammidown*, 20 Pick. (Mass.) 535.

⁵ *Praed v. Gardiner*, 2 Cox Ch. Cas. 86.

by the principal to the creditor for several successive loans, though he was surety for only one loan, if he has been obliged to pay the loan, so as to obtain out of the balance of the several securities, after the creditor is satisfied, reimbursement for what he has been obliged to pay as surety.¹ The first purchaser of several lots of land having given his separate note for each lot with the same indorser, and the lots having been afterwards resold for his default in the payment of these notes, and some of the lots having brought more and some less than the first contract price, this indorser was allowed to marshal the proceeds of these sales, so as to make good the deficiency of one set by the surplus of the other.²

§ 115. **Surety cannot require the Creditor to resort first to Security.** — The right of the surety does not extend to requiring the creditor to exhaust the security given to him by the principal debtor for the payment of the debt before coming upon the surety.³ The subrogation of the surety will never be allowed to the prejudice of the creditor's right to collect his debt; the latter may proceed against the surety personally, and at the same time subject the collateral security to the payment of his debt until he has obtained full satisfaction.⁴ The creditor may proceed against the surety in the first instance, or against the principal and the surety jointly, for the satisfaction of his demand.⁵ The payee of a note may maintain an action thereon without first exhausting a mortgage-security given by the principal.⁶ In an action upon a guaranty, the guarantor was held to be still liable, notwithstanding the fact that the creditor had entered upon the land of the principal debtor under a mortgage given to him by the latter to secure the

¹ Heyman v. Dubois, L. R. 13 Eq. 158.

² Smith v. Arden, 5 Cranch C. C. 485.

³ Brick v. Freehold Banking Co., 37 N. J. Law, 307.

⁴ Harlan v. Sweeney, 1 Lea (Tenn.), 682; Brown v. Brown, 17 Ind. 475.

⁵ Muscatine v. Miss. R. R. Co., 1 Dillon C. C. 536; Domestic Sewing Machine Co. v. Saylor, 86 Penn. St. 287; Fuller v. Loring, 42 Maine, 481; Gary v. Hignutt, 32 Md. 552.

⁶ Allen v. Woodard, 125 Mass. 400; Buffalo Bank v. Wood, 71 N. Y. 405.

debt.¹ The existence of a judgment which is a lien upon the lands of the principal, and on which the money might be made by issuing an execution, is no reason for refusing the creditor a recovery against the surety.² An indorser of a promissory note given as collateral security for the payment of a sum of money directed by the order of a court of chancery to be paid by the maker of the note on pain of attachment has no right to require the creditor to enforce the attachment previous to calling on him for payment.³ Where a party in giving a lease of land takes notes with a surety for the payment of the rent, and also reserves in his lease the right of distress, the landlord is not bound to assert the right of distress, but may collect the notes from the surety.⁴ The surety must first pay the debt, and can then himself enforce the securities.⁵

§ 116. **Right of Subrogation destroyed by Application of the Security upon the Debt.** — Although the surety is entitled to the benefit of a security held by the creditor for the payment of the debt, yet, if the whole security has been applied upon the debt without paying it in full, and the surety has been compelled to make up the deficiency, he cannot then resort to the creditor for subrogation or contribution; for this would so far defeat the very object, the payment of the debt, for which the security was taken.⁶ And if the debt is paid by the principal debtor, a mortgage held by the creditor to secure its payment is thereby extinguished;⁷ and an assignment of it by the surety to secure money borrowed by him on his individual account

¹ *Crocker v. Gilbert*, 9 Cush. (Mass.) 131.

² *Geddis v. Hawk*, 1 Watts (Penn.), 280, reversing *Hawk v. Geddis*, 16 Serg. & R. (Penn.) 23; *Neff's Appeal*, 9 Watts & Serg. (Penn.) 36.

³ *Beardsley v. Warner*, 6 Wend. (N. Y.) 610.

⁴ *Hall v. Hoxsey*, 84 Ills. 616; *Brooks v. Carter*, 36 Ala. 682.

⁵ *Buffalo Bank v. Wood*, 71 N. Y. 405; *Brick v. Freehold Banking Co.*, 37 N. J. Law, 307; *Geddis v. Hawk*, 1 Watts (Penn.), 280; *Hall v. Hoxsey*, 84 Ills. 616.

⁶ *Belcher v. Hartford Bank*, 15 Conn. 381.

⁷ *Tarbell v. Parker*, 101 Mass. 165; *Shackleford v. Stockton*, 6 B. Mon. (Ky.) 390.

is invalid, especially if the lender knew before such assignment that the original debt had been paid.¹

§ 117. **Creditor's Right to apply Security as needed for his own Protection.** — A creditor who holds against the same debtor several securities for different debts, on which there are distinct sureties who are more or less able to pay, may obtain security or satisfaction, by attachment, and judgment or otherwise of one debt in full, and yet retain his entire claim upon the surety for the others. Neither law nor equity requires that such a payment shall be considered to have been made for the benefit of all the sureties ratably.² The holder of different notes for which he has one security may apply the whole proceeds of the security upon the notes last due, and continue to hold a surety upon the earlier ones.³ And where a debtor gave to one creditor to secure his demand a mortgage of two funds and also a covenant by a surety, and then gave a second mortgage of one of the funds to another creditor, and, the second creditor's fund having been exhausted by part payment of the first creditor's debt, the surety paid the balance due to the first creditor and took a transfer of the first mortgage, it was held that the second creditor had a right to marshal the securities against the surety, and that the second creditor's right to be subrogated to the first fund was superior to the surety's equity.⁴ Where the creditor, holding a surety for the payment of his debt, took from the debtor a mortgage to secure both this and an additional indebtedness, it was held that the surety would have no right of subrogation to this mortgage until both debts had been paid to the creditor; and the creditor was allowed to apply all the proceeds of the security upon the second indebtedness, and still to hold the

¹ *Kinley v. Hill*, 4 Watts & Serg. (Penn.) 426.

² *Shaw, C. J.*, in *Dalton v. Woburn Association*, 24 Pick. (Mass.) 257; *Harding v. Tift*, 75 N. Y. 461; *Hansen v. Rounsavell*, 74 Ills. 238.

³ *Matthews v. Switzler*, 46 Mo. 301; S. P. in *Mosher v. Hotchkiss*, 3 Abbott (N. Y.) App. Dec. 326.

⁴ *South v. Bloxham*, 2 Hem. & Mill. 457.

surety for the first.¹ If a mortgage runs jointly to the creditor and the surety, and is conditioned for the payment both of a note given by the mortgagor to the creditor and of another note given by the mortgagor and the surety to the creditor, the surety cannot, upon paying the note for which he is liable, assert any rights under this mortgage against the creditor, until the creditor's other note is paid; if the surety wishes to avail himself of the mortgage, he must, on default of the debtor, pay the latter note also.² But in Alabama, if several debts are secured by a mortgage given by the principal debtor, and for some of the debts there are sureties who are not parties to the mortgage, the mortgagee is regarded as a trustee of the sureties for the amount of the funds thus provided for their indemnity, and must apply a just *pro rata* proportion of the proceeds of the mortgaged property upon the notes for which the sureties are bound, operating a payment of these notes *pro tanto*, and discharging the sureties to that extent.³ The same principle has been adopted in New York.⁴ If money or securities are deposited with the creditor by the principal debtor, to be applied upon an indebtedness on which there is a surety, the creditor has no right against the surety to apply them upon another debt on which the surety alone is liable.⁵ And if the proper application has once been made, it cannot be afterwards changed, so as to revive the obligation of the surety.⁶

§ 118. **Surety for Part of a Debt cannot be subrogated, while the other Part remains unpaid.**—A surety for part of the debt is not entitled to the benefit of a security given by the debtor to the creditor at a different time for another part of the debt.⁷ A vendor of land took the notes of the vendee without any

¹ *Stamford Bank v. Benedict*, 15 Car. 235; *Wetherell v. Joy*, 40 Maine, Conn. 437. 325.

² *Root v. Stow*, 13 Met. (Mass.) 5. ⁶ *Miller v. Montgomery*, 31 Ills.

³ *Fielder v. Varner*, 45 Ala. 429. 350.

⁴ *Cory v. Leonard*, 56 N. Y. 494.

⁷ *Wade v. Coope*, 2 Sim. 155.

⁵ *Rosborough v. McAliley*, 10 So. See also *Grubbe v. Wisors*, 32 Gratt. (Va.), 127.

security for the payment of the purchase-money, retaining only a lien upon the land to secure the payment of the notes. Apprehending that the land would be an insufficient security for the purchase-money, he brought an action upon the first one of these notes, and attached certain personal property of the vendee of the value of one thousand dollars. To secure the release of this property, the vendee gave to the vendor a bond with sureties in the sum of a thousand dollars, as collateral security to that amount for the note upon which the suit was brought. Judgment was then rendered for the amount due upon the note. Afterwards the vendor obtained a judgment upon the third note, and sold the land upon these judgments. He applied the proceeds of this sale first upon the last judgment, and only the balance of these proceeds upon the first judgment, leaving due thereon an amount exceeding the bond. The sureties upon the bond contended that, as the first judgment was a lien upon the land sold, they had a right to be substituted as to this lien to the place of the judgment-creditor, and that as he had discharged this lien by selling the land on the executions, he had thereby discharged their liability. But it was held that they had no such right; that the vendor, by giving up his attachment for the bond, became the purchaser of the bond for a valuable consideration, and that the doctrine of subrogation did not apply to the case; that it was not the case of a surety asking to be substituted to the place of a creditor who had collateral security for the debt, but of a surety for one part of the debt asking to be substituted for the creditor in relation to a security which the creditor had the right to apply upon another part of his debt, when the effect would be to deprive the creditor of his resources, and cause him a partial loss of his demand.¹ But this rule means only that the surety's creditor must be satisfied: if a mortgage is made to two different mortgagees to secure their respective demands against the same debtor, a

¹ *Crump v. McMurty*, 8 Mo. 408.

surety to one of the mortgagees for his demand who pays the same, being the whole amount due to this creditor, will be subrogated to the same *pro ratâ* interest in the mortgage which was possessed by the creditor whom he has paid.¹

§ 119. **Surety discharged by Creditor's giving up Security to which he would be subrogated.**—As the surety is entitled to the benefit of every security which the creditor holds against the principal debtor, whether the surety has known of the existence of the security or not, so, if the creditor interferes with the debtor's right of subrogation by losing or parting with any such security without the consent of the surety, the surety is thereby discharged to the extent of the value of such security.² Not only an actual parting with the security, but any dealing with it such that the surety cannot have the benefit of it in the same condition in which it existed in the creditor's hands, will have this effect.³ The surety is entitled to the benefit of all the securities in the hands of the creditor; and if any of these are lost by the creditor's acts or neglect, the surety is discharged to the extent to which the acts of the creditor may have prejudiced his recourse for the reimbursement of what he may be obliged to pay under his contract of suretyship.⁴ Any affirmative act of the creditor by which a security of which the surety might have availed himself is put out of the latter's reach operates as a discharge of the surety *pro tanto*.⁵ And this principle is now generally extended to securities taken by the creditor after the contract of suretyship has been made,⁶

¹ *Lynch v. Hancock*, 14 So. Car. 66.

² *Wulff v. Jay*, L. R. 7 Q. B. 756, 762; *Bechervaise v. Lewis*, L. R. 7 C. P. 372, 377; *Griswold v. Jackson*, 2 Edw. Ch. (N. Y.) 461; *Fegley v. McDonald*, 89 Penn. St. 128; *Smith v. McLeod*, 3 Ired. Ch. (Nor. Car.) 390; *Ruble v. Norman*, 7 Bush (Ky.), 582; *Dillon v. Russell*, 5 Nebraska, 484; *Burr v. Boyer*, 2 Nebraska, 265; *Allen v. Henley*, 2 Lea (Tenn.), 141.

³ *Pledge v. Buss*, Johns. (Eng.

Ch.) 663; *Hubbard v. Pace*, 34 Ark. 80; *Lafayette County v. Hixon*, 69 Mo. 581; *Cordaman v. Malone*, 63 Ala. 556.

⁴ *Pratt's Succession*, 16 La. Ann. 357; *Chaffe v. Taliaferro*, 58 Miss. 544.

⁵ *Philbrook v. McEwen*, 29 Ind. 347; *Guild v. Butler*, 127 Mass. 386; *Cullum v. Emanuel*, 1 Ala. 23.

⁶ *Scanland v. Settle*, Meigs (Tenn.), 169; *Pearl St. Society v. Imlay*, 23

although it has been determined in England that there is no such implied obligation in the contract of suretyship as to require the creditor to retain for the protection of the surety securities for the debt which he may have acquired from the principal debtor subsequently to the contract of suretyship, and which, while the creditor holds them, the surety does not call upon him to enforce; and that a creditor who, having taken a further security from the principal after the contract of suretyship was made, afterwards parts with that security, does not thereby discharge the surety, either wholly or *pro tanto*.¹

§ 120. **Creditor held to Responsibilities of Trustee for Surety.**

— The creditor who, holding the engagement of a surety, takes also from the principal debtor collateral security for the payment of the debt, is bound to hold the property which he so takes in trust, not only for his own benefit, but also for the protection of the surety.² He must, in dealing with the fund, act with good faith towards the surety as his *cestui que trust*, and hold it fairly and impartially for the benefit of the surety as well as of himself. He must account to the surety for the value of the property, not only if he parts with it, or surrenders it without the consent of the surety, or does any affirmative act in violation of the trust upon which he holds it, but also for his negligence, or omission to perform any act, whereby the surety's recourse to the fund is prejudiced.³ Though mere non-action by the creditor will not ordinarily release the surety,⁴ yet, if

Conn. 10; *May v. White*, 40 Iowa, 246; *Springer v. Toothaker*, 43 Maine, 381; *Sherradeen v. Parker*, 24 Iowa, 28; *Nelson v. Williams*, 2 Dev. & Bat. Eq. (Nor. Car.) 118.

¹ *Newton v. Chorlton*, 10 Hare, 616.

² *Kesler v. Linker*, 82 Nor. Car. 456; *McMullen v. Hinkle*, 39 Miss. 142; *Hardin v. Eames*, 5 Ills. App. 153.

³ *Strange v. Fooks*, 4 Giff. 408; *Watts v. Shuttleworth*, 5 Hurl. & Nor.

235; S. C., on error, 7 Hurl. & Nor. 353; *Taylor v. Scott*, 62 Ga. 39; *Payne v. Commercial Bank*, 6 Sm. & M. (Miss.) 24; *Phares v. Barbour*, 49 Ills. 370; *Brockman v. Sieverling*, 6 Ills. App. 512; *Sherradeen v. Parker*, 24 Iowa, 28; *Saulet v. Trepagnier*, 2 La. Ann. 427.

⁴ *Trent Navigation Co. v. Hurley*, 10 East, 34; *Allen v. Brown*, 124 Mass. 77; *McKechnie v. Ward*, 58 N. Y. 541; *Clark v. Sickles*, 64 N. Y.

it is such non-action as to render unproductive some collateral security, such as a mortgage, held for the payment of the debt, this will be an available defence for the surety, at least *pro tanto*.¹ If he waives his security by proving his claim as an unsecured one against the estate of the principal debtor in bankruptcy, this will discharge the surety to the extent of the value of the security thus released;² but in England it has been held that the creditor is none the less entitled to exercise his option of surrendering the security and proving in full against the principal's estate, because he holds a surety, and that the surety will not be discharged by such proof.³ The right of the creditor against the surety will be destroyed by making such a compromise with the principal debtor that the surety cannot for his reimbursement be subrogated to the creditor's rights;⁴ but a compromise which preserves the privileges of the surety will not have this effect.⁵

§ 121. **Laches of Creditor resulting in Loss of Security may discharge Surety.** — Accordingly it has been held that the creditor's failure to record a mortgage or conveyance of property which has been given to him by the principal debtor as a security for the debt, whereby the benefit of the security is lost both to the creditor and the surety, will discharge the surety to the extent of the value of the property;⁶ for the loss

231; *Schroeppel v. Shaw*, 3 N. Y. 446; *Deck v. Works*, 18 Hun (N. Y.), 266; *Canton Bank v. Reynolds*, 13 Ohio, 85; *Kirby v. Studebaker*, 15 Ind. 45; *Vason v. Beale*, 58 Ga. 500; *Pickens v. Finney*, 12 Sm. & M. (Miss.) 468; *Clopton v. Spratt*, 52 Miss. 251; *Buckalew v. Smith*, 44 Ala. 638; *Humphreys v. Crane*, 5 Calif. 173; *Parker v. Alexander*, 2 La. Ann. 188; *Murrell v. Scott*, 51 Tex. 520; *Hunter v. Clark*, 28 Tex. 159; *Terrell v. Townsend*, 6 Tex. 149.

¹ *Lumsden v. Leonard*, 55 Ga. 374; *City Bank v. Young*, 43 N. H. 457; *Ramsey v. Westmoreland Bank*, 2 Pen. & Watts (Penn.), 203; *Gillespie v. Darwin*, 6 Heisk. (Tenn.) 21; *Merchants' Bank v. Cordevoille*, 4 Rob. (La.) 506.

² *Jones v. Hawkins*, 60 Ga. 52.

³ *Rainbow v. Juggins*, 5 Q. B. Div. 133; S. C. affirmed on appeal, 5 Q. B. Div. 422.

⁴ *Renick v. Lushington*, 14 W. Va. 367.

⁵ *Mueller v. Dobschuetz*, 89 Ills. 176.

⁶ *Capel v. Butler*, 2 Sim. & Stu. 457; *Wulff v. Jay*, L. R. 7 Q. B. 756; *Teaff v. Ross*, 18 Ohio St. 469; *Burr v. Boyer*, 2 Nebraska, 265.

must be borne by the person to whose neglect it was due. This has, however, been denied in Indiana¹ and in South Carolina;² but the generally accepted doctrine is that the creditor should be held responsible for the loss of any security arising from his wrongful acts, whether of omission or of commission.³ If, however, the creditor's neglect has not resulted in the loss of any means of payment to which the surety, on discharging the debt, would have the right to be subrogated, the creditor's claim upon him will not be affected.⁴ And as laches cannot be imputed to the government, the failure of a county court to take a mortgage on real estate in fee, free from all liens or incumbrances, as was required by statute, to secure the payment of school-money loaned, will not discharge a surety for the loan.⁵ And though a rule of court requires that a recognizance should be taken and recorded for the payment of the rent of property in charge of the court, a failure of the clerk of the court to record such a recognizance, whereby a lien for the rent upon the property of the lessee is lost, will not discharge a surety for the payment of the rent from his liability.⁶ So, where an order of court, made in pursuance of a statute, provided that a mortgage should be taken for the purchase-money of property sold at an administrator's sale, a surety for the purchase-money was held to be liable therefor, although, contrary to his expectation, no such mort-

¹ *Philbrook v. McEwen*, 29 Ind. 347.

² *Hampton v. Levy*, 1 McCord Eq. (So. Car.) 107; *Lang v. Brevard*, 3 Strobb. Eq. (So. Car.) 59.

³ *Douglass v. Reynolds*, 7 Peters, 113; *Gettysburg Bank v. Thompson*, 3 Grant (Pa. Cas.), 114; *Sluppen v. Clapp*, 36 Penn. St. 89; *Kemmerer v. Wilson*, 31 Penn. St. 110; *Sellers v. Jones*, 22 Penn. St. 423; *Jennison v. Parker*, 7 Mich. 355; *Slevin v. Morrow*, 4 Ind. 425; *Lamberton v. Windom*, 18 Minn. 506; *Cronuse, J.*, in *Burr v. Boyer*, 2 Nebraska, 265;

Chichester v. Mason, 7 Leigh (Va.), 244; *Lee v. Baldwin*, 10 Ga. 208; *Pickens v. Yarborough*, 26 Ala. 417; *Noland v. Clark*, 10 B. Mon. (Ky.) 239; *Wood v. Morgan*, 5 Sneed (Tenn.), 79; *Hill v. Bourcier*, 29 La. Ann. 841; *Watson v. Alcock*, 1 Sm. & Giff. 319; S. C., on appeal, 4 De G., M. & G. 242.

⁴ *Pottawattamie Co. v. Taylor*, 47 Iowa, 520.

⁵ *Marion County v. Moffett*, 15 Mo. 604.

⁶ *Jephson v. Maunsell*, 10 Irish Eq. 38 and (on appeal) 132.

gage was taken, no misrepresentation having been made to him.¹

§ 122. **Creditor's Discharge of Levy or Attachment on the Property of the Principal, how far a Discharge of the Surety.**— If the creditor has obtained the levy of an execution for the debt upon property of the principal sufficient to satisfy the debt, and then releases the levy, this will discharge the surety ; for this is a security which the surety can require the creditor to preserve.² Much less can the creditor, to the injury of the surety, discharge the levy, so as to let in another debt due to himself,³ or assign his judgment to another person, so as to enable the latter, by discharging the levy, to save another debt out of the property, to the loss of the surety.⁴ A release of property upon which the judgment is a lien will have the same effect as if the property had been actually taken upon a levy.⁵ If the lien of the judgment upon the land of the principal debtor has been lost by the creditor's having proved it as an unsecured debt against the estate of the principal in bankruptcy, this will discharge the surety to the extent of the injury thereby resulting to him, but only to this extent.⁶ And it has been held that after property of the principal has been levied upon, a delivery of such property by the sheriff to the principal debtor will discharge the surety to the extent of the value of this property ; for if the creditor was not in fault, the sheriff will be liable to him, and the surety should be released ; if the creditor was in fault, then *a fortiori* the surety should be released.⁷ But the mere failure of the officer through negligence to make the money out of the property of the principal will not

¹ Wornell v. Williams, 19 Tex. 180.

³ McMullen v. Hinkle, 39 Miss.

² Stephens v. Monongahela Bank, 142.

83 Penn. St. 157 ; Cooper v. Wilcox, 2 Dev. & Bat. Eq. (Nor. Car.) 90 ; Winston v. Yeargin, 50 Ala. 340 ; Curan v. Colbert, 3 Ga. 239 ; Brown v. Riggins, 3 Ga. 405 ; Morley v. Dickinson, 12 Calif. 561 ; Jenkins v. McNeese, 34 Tex. 189.

⁴ Nelson v. Williams, 2 Dev. & Bat. Eq. (Nor. Car.) 118.

⁵ Holt v. Bodey, 18 Penn. St. 207 ; Hollingsworth v. Tanner, 44 Ga. 11 ; McMullen v. Hinkle, 39 Miss. 142.

⁶ Jones v. Hawkins, 60 Ga. 52.

⁷ Lumsden v. Leonard, 55 Ga. 374.

discharge the surety.¹ If the delay or dismissal of the levy does not annul the lien of the judgment upon the property, then, as the rights of the surety are not thereby affected, he will not be discharged from his liability;² a mere suspension of execution will not discharge the surety,³ unless it is the result of an agreement of the creditor with the principal debtor not to issue execution, or not to attempt collection from him.⁴ Some act of interference with the surety's right of subrogation to a security or a remedy must be shown to operate his discharge by reason of the creditor's neglect in pursuing the principal or his property.⁵ The lien of an attachment for the debt obtained by the creditor upon the property of the principal debtor is a security for the debt⁶ which will inure to the benefit of the surety; and its discharge will release the surety, at least *pro tanto*.⁷ It has indeed been decided that the release by the creditor of an attachment upon the property of the principal will not discharge a surety for the debt, because the creditor is not bound to prosecute a suit or to use any active diligence to obtain payment from the principal;⁸ but no satisfactory reason has ever been given why the release of an attachment lien upon the property of the principal should be distinguished from that of any other lien.⁹ The mere failure, however, of the creditor to prosecute a suit which he has commenced

¹ Moss v. Craft, 10 Mo. 720.

² Wyley v. Stanford, 22 Ga. 385; Summerhill v. Tapp, 52 Ala. 227; Ambler v. Leach, 15 W. Va. 677.

³ Summerhill v. Tapp, 52 Ala. 227; Hetherington v. Mobile Bank, 14 Ala. 68; Crawford v. Gauden, 33 Ga. 173; Jerauld v. Trippett, 62 Ind. 122; Manice v. Duncan, 12 La. Ann. 715; Humphrey v. Hitt, 6 Gratt. (Va.) 509; Sharp v. Fagau, 3 Sneed (Tenn.), 541.

⁴ Evans v. Raper, 74 Nor. Car. 639; Blazer v. Bundy, 15 Ohio St. 57; Storms v. Thorn, 3 Barb. (N. Y.) 314.

⁵ Jackson v. Patrick, 10 So. Car. 197.

⁶ Cook, *in re*, 2 Story C. C. 376.

⁷ Springer v. Toothaker, 43 Maine, 381; Maquoketa v. Willey, 35 Iowa, 323; Ashby v. Smith, 9 Leigh (Va.), 164; Missouri Bank v. Matson, 24 Mo. 333.

⁸ Baker v. Marshall, 16 Vt. 522; Montpelier Bank v. Dixon, 4 Vt. 587; Barney v. Clark, 46 N. H. 514; Bel-lows v. Lovell, 5 Pick. (Mass.) 307.

⁹ See Hollingsworth v. Tanner, 44 Ga. 11; Frenor v. Yingling, 37 Md. 491; State Bank v. Edwards, 20 Ala. 512; Dixon v. Ewing, 3 Hammond (Ohio), 280; Hurd v. Spencer, 40 Vt. 581.

against the principal for the debt, no security having been obtained therein, will not release the surety.¹ It has been said in California that this doctrine of the release of the surety will not be applied in favor of one of the joint makers of a promissory note who was in fact a surety for the other makers; for that they were all principal debtors as to the creditor, and that the relation of suretyship existed only as between themselves:² but in Pennsylvania it is held to be immaterial whether the creditor, at the time that he releases the property, does or does not know of the relation of his debtors among themselves as principal and surety; if he in fact releases the property of the principal, he does so at his peril.³

§ 123. **Creditor bound to retain Money or Property of the Principal rightfully in his Hands.**—Whenever the creditor has in his hands money or property of the principal debtor, which he may rightfully retain and apply to the payment of the debt, without violating any duty or subjecting himself to any action, if, instead of retaining it, he suffers it to pass into the possession of the principal, the surety is thereby to that extent discharged;⁴ but this must be property on which the creditor has a lien for the debt, to which the surety, on payment by him, can be subrogated.⁵ Thus, a corporation which has the option to prevent the transfer of stock by its shareholders who are indebted to it, but has never exercised that option, will not lose its right to hold a surety for an indebtedness of one of its stockholders by allowing the latter to transfer his stock, the surety never having called upon the corporation to enforce its possible lien.⁶ A creditor who holds a judgment against prin-

¹ *Somerville v. Marbury*, 7 Gill & Johns. (Md.) 275; *Richards v. Commonwealth*, 40 Penn. St. 146; *Manchester Bank v. Bartlett*, 13 Vt. 315; *Creath v. Sims*, 5 Howard, 192.

² *Shriver v. Lovejoy*, 32 Calif. 574.

³ *Holt v. Bodey*, 18 Penn. St. 207.

⁴ *Law v. East India Co.*, 4 Vcsey, 824; *Kinnaird v. Webster*, 10 Ch.

Div. 139; *Pearl St. Society v. Imlay*, 23 Conn. 10; *Richards v. Commonwealth*, 40 Penn. St. 146.

⁵ *Glazier v. Douglass*, 32 Conn. 393; *Beaubien v. Stoney*, Speers Eq. (So. Car.) 508; *Taylor v. Jeter*, 23 Mo. 244.

⁶ *Perrine v. Mobile Ins. Co.*, 22 Ala. 575.

principal and surety does not release the surety by employing the principal to do work for him, and then paying the principal for such work in accordance with an agreement to do so, instead of setting it off against his judgment.¹ Nor will the creditor discharge the liability of the surety by purchasing property of the principal and paying him for it, before the debt for which the surety is liable becomes due and payable.² Where, after the contract of suretyship had been made, the principal debtor gave to the creditor, as new security, a mortgage of real estate, under an agreement that the creditor should surrender this mortgage when the debtor should furnish other sufficient security in its place, and afterwards, on the debtor's furnishing the indorsement of a responsible person, the creditor gave up this mortgage, it was held that this surrender of a security did not release the original surety, because the creditor, under the agreement by which he acquired it, had no right to retain it after other sufficient security had been furnished.³ So, where principal and surety were indebted to a bank on a note which was overdue, and the principal deposited more than the amount of the note with the bank, on the express agreement that this deposit should be applied to meet certain checks which were to be drawn against it, the bank would not release the surety by paying such checks out of this deposit.⁴ And the surety's defence founded upon the surrender by the creditor of a bond or other similar security given to him by the principal debtor may be rebutted by proof that such bond was forged or fraudulent, so that it could not have been enforced against the obligor therein.⁵ In all these cases, if the creditor had preserved the property or means of payment in his own hands, and then collected the debt from the surety, the latter would have had no right of subrogation to these resources; and therefore he was not released by their surrender. But since, if the principal

¹ *Hollingsworth v. Tanner*, 44 Ga. 11.

² *Higdon v. Bailey*, 26 Ga. 426.

³ *Pearl St. Society v. Imlay*, 23 Conn. 10.

⁴ *Wilson v. Dawson*, 52 Ind. 513.

⁵ *Loomis v. Fay*, 24 Vt. 240.

debtor were insolvent, his set-off against the creditor would be available to the surety,¹ it has been held that an insurance company holding the note of a deceased policy-holder for money lent to him, and knowing that his estate is insolvent, is bound to retain the money due on the note out of the amount payable to the administrator of the deceased upon the policy; and its neglect so to do will discharge a surety upon the note.²

§ 124. **Neglect of a Bank to apply Deposits of the Principal upon his Note, how far a Release of the Surety.** — It has been held that the neglect of a bank to apply the funds of the principal debtor deposited with itself to the payment of his note due to the bank will discharge the sureties and indorsers upon such note, on the ground that the bank had a lien upon these funds for the payment of the note, which it might have enforced, and which therefore the surety could require it to exercise for his protection.³ This has, however, been denied, on the ground that such agreement is purely optional with the bank,⁴ which cannot be compelled to violate the terms upon which the money was obviously placed in the bank, for the payment of the depositor's checks.⁵ The true principle is undoubtedly that which has been laid down in an English case,⁶ that if the circumstances show that a bond given by a depositor to a bank was intended to be a continuing security, the sureties cannot insist upon such an application.

§ 125. **Rights of a Surety who has paid the Debt in Ignorance of the Creditor's Discharge of a Security.** — When a creditor makes an agreement whereby a security is made valueless to a surety who is entitled to be subrogated thereto, and the surety, in ignorance of such agreement, pays the debt to the

¹ *Antea*, § 101; *Walsh v. Colquitt*, 64 Ga. 740.

² *White v. Life Association of America*, 63 Ala. 419.

³ *Kinnaird v. Webster*, 10 Ch. Div. 139; *McDowell v. Wilmington Bank*, 1 Harringt. (Del.) 369; *Dawson v. Real Estate Bank*, 5 Pike (Ark.), 283.

⁴ *Antea*, § 123.

⁵ *Newburg Bank v. Smith*, 66 N. Y. 271; *Martin v. Mechanics' Bank*, 6 Harr. & Johns. (Md.) 235; *Voss v. German Bank*, 83 Ills. 599.

⁶ *Henniker v. Wegg*, 4 Q. B. (Ad. & El.) 792.

creditor after a judgment has been recovered against him by the latter, the surety is entitled to recover from the creditor the value of the security which the creditor has thus made valueless to him. This doctrine was laid down under the following circumstances: The Kingston Bank discontinued a suit which it had brought against the maker and indorsers of a promissory note, upon the execution of a bond by three of the parties to the note, conditioned for the payment of the amount due thereon in eight months; and this bond was delivered under a secret agreement that the bank would endeavor to collect the amount of the note from those parties who were only liable as sureties thereon, the primary obligation being upon the obligors in the bond and the other parties to the note which it was given to secure. The sureties upon the note being ignorant of this condition, afterwards paid a judgment recovered against them by the bank for the same debt, and the bank transferred the bond to them; and it was held that the bond having, by reason of the condition made when it was delivered, become satisfied when the bank received payment from the sureties, the latter were in equity entitled to recover back from the bank whatever they had paid on the judgment.¹

§ 126. **Instances where Surety discharged by Creditor's Interference with his Right of Subrogation.** — The vendor of slaves sold in a lump for a round sum, received from the purchaser a note for the price, indorsed by a third person as surety for the payment thereof, and subsequently repurchased some of the slaves from his vendee; and it was held that as the vendor's right of rescission, or lien upon the property for the price, and the surety's right of subrogation thereto, were indivisible, and could not be exercised upon merely a part of the property which had been sold in a lump for a round sum, he had, by his repurchase, destroyed the surety's right of subrogation, and so released the latter from his liability.² A party signed a note as surety for the principal, and delivered it to the principal,

¹ *Chester v. Kingston Bank*, 16 N. Y. 336.

² *Hereford v. Chase*, 1 Rob. (La.) 212.

with authority to insert the name of the payee in a blank left in the note for that purpose. The principal borrowed of the plaintiff the amount of the note, inserted his name as payee, and delivered the note to him, and at the same time gave him a colt as additional security for its payment. The payee afterwards delivered up the colt to the principal; and it was held that he thereby discharged the surety to the extent of the value of the colt.¹ The creditor, having recovered a judgment for the debt against the principal debtor, assigned the same to a third party, together with certain property which had already been sold on the execution and bid in by the creditor, reserving, however, the right to enforce a judgment which he had also obtained against a surety for a part of the same debt. At the same time he gave to the principal a receipt, in which he agreed not to enforce against him any claims on the judgment or the note upon which the judgment was rendered. It was held that by this arrangement the creditor in effect released the principal debtor from all further obligation to pay that part of the debt for which the surety was liable, and accordingly had in effect exonerated the surety also.² A builder agreed to erect a building, for which he was to receive specified sums during the progress of the work, and the balance of the agreed price sixty days after the completion of the building, and gave a surety for the proper performance of his contract. The building having been completed, the owner, although he had received notice of various mechanics' liens from the sub-contractors, paid the builder the balance of the contract-price before it was due under the contract. He afterwards had to pay the amount of the liens, and sued the builder's surety therefor; but it was held that he had exonerated the surety by failing to retain the sums that fell due after he had received notice of the liens.³ But the mere fact that an agent em-

¹ *Kirkpatrick v. Hawk*, 80 Ills. 122. See also *Port v. Robbins*, 35 Iowa, 208.

² *Hubbell v. Carpenter*, 5 Barb. (N. Y.) 520.

³ *Taylor v. Jeter*, 23 Mo. 244; *Lucas County v. Roberts*, 49 Iowa, 159. *Antea*, § 123.

ployed to sell machines on a commission is paid some of his commissions before they are due under his contract will not of itself release a surety upon a bond given by him for the faithful performance of his obligations.¹ A debtor gave notes to several banks for the respective amounts which he owed them, and at the same time gave them collateral security of two classes; the first class consisting of notes given for debts due to himself, and the second class consisting of notes made, indorsed, or guaranteed by a surety for his accommodation. By an indenture, to which the surety and the banks were parties, he then assigned all his property, including choses in action, to a trustee to pay the debts due to the banks. By the terms of the indenture, the banks were authorized to use their discretion in collecting the notes of the first class, and were to apply their proceeds, when collected, to the payment of his debts due to the banks. It was also provided in the indenture that the banks might hold the notes of the second class as collateral security, and not collect them, until the trustee should have made a final disposition of the property assigned to him, and have distributed their proceeds among the banks. The banks, with the consent of the debtor and of the trustee, but not of the surety, made in good faith a compromise with several of the makers of the notes of the first class, so that a balance remained due to the banks, after the proceeds of the property assigned to the trustee had been paid to them, whereas, if these notes had been collected in full, the banks would have been fully paid. On a bill in equity brought by the banks against the surety, it was held that they had discharged him, to the extent of the sums given up by their compromise, from his liability on the notes of the second class.² The surrender of a leasehold estate by a tenant and its acceptance by the landlord were held to exonerate a third party from the burden of a mortgage which he had given to the landlord as security for the per-

¹ *Howe Machine Co. v. Woolley*,
50 Iowa, 549.

² *American Bank v. Baker*, 4 Met.
(Mass.) 164.

formance by the tenant of his covenants in the lease, on the ground that the term was a security to which he might have resorted for his indemnity, and which could not have been taken from the defendant without freeing him from his liability.¹ But it has been held in New York that the surrender of a lease and the release of the rent thereafter to accrue will not discharge one who has guaranteed the payment of the rent reserved in a lease, from his liability for the rent which is overdue at the time of such surrender.² A creditor who held a mortgage from the principal debtor, and also a mortgage from the principal's wife as his surety, bought of the principal the premises mortgaged by him for a price exceeding the amount of his debt, but did not apply the price in payment of his debt; and it was held that he thereby discharged the mortgage which he had from the surety; for he had rendered unavailing the mortgage given by the principal, to which the surety had a right to be subrogated.³ But a creditor who holds both the liability of a surety and the security of a mortgage from the principal debtor will not discharge the surety by simply purchasing the equity of redemption from the principal, if he makes the purchase in good faith and with just intentions, avowing it to be his purpose to give the surety the benefit of the mortgage, and to appropriate the rents and profits in aid of his liability; for this will not operate a merger of the mortgage,⁴ and the surety's right of subrogation will not be impaired.⁵ The surety will not be discharged, unless his right of subrogation to the securities and remedies of the creditor has been impaired.⁶ If the creditor does any act which destroys or impairs the surety's right of subrogation to his mortgages or

¹ *Haberton v. Bennett*, 1 Beatty Ch. (N. Y.) 135; *Wheelwright v. De* (Ir. Ch.), 386. See also *Nichols v. Peyster*, 4 Edw. Ch. (N. Y.) 232. *Palmer*, 48 Wisc. 110; *Farrar v. Kramer*, 5 Mo. App. 167.

⁴ *Antea*, § 57 *et seq.*

⁵ *Cullum v. Emanuel*, 1 Ala. 23.

² *Kingsbury v. Westfall*, 61 N. Y. 356.

⁶ *Payne v. Commercial Bank*, 6 Sm. & M. (Miss.) 24; *Muller v. Wadlington*, 5 So. Car. 342.

³ *Loomer v. Wheelwright*, 3 Sandf. ton, 5 So. Car. 342.

privileges,¹ or to his remedies against the principal,² he thereby releases the surety.

§ 127. **Surety not entitled to Subrogation until the whole Debt is paid.** — The right of subrogation does not arise in favor of a surety until he has actually paid the debt for which he is liable as surety;³ the right does not accrue to the surety upon his making a partial payment, until the creditor is wholly satisfied.⁴ Even if a surety is liable only for a part of the debt, and pays that part for which he is liable, he cannot be subrogated to the securities held by the creditor for the debt, until the whole demand of the creditor is satisfied.⁵ Where the surety is allowed by bill in equity after the debt has become due to compel the creditor to enforce his demand against the principal debtor,⁶ yet he cannot be subrogated to the creditor's liens, securities, and equities for the debt until he has actually paid it.⁷ So, the indorser of a promissory note which is payable on time and secured by a mortgage of the principal's real estate, who has been compelled by the holder of the note to pay the interest which has become due thereon, cannot enforce the mortgage for his indemnity, while the note remains the property of another holder and the principal sum is still due

¹ *Morphy, J.*, in *Hereford v. Chase*, 1 Rob. (La.) 212; *St. Joseph's Ins. Co. v. Hauck*, 71 Mo. 464.

² *Boschert v. Brown*, 72 Penn. St. 372; *Boyd v. McDonough*, 39 How. Pr. (N. Y.) 389; *Wheaton v. Wheeler*, 27 Minn. 464.

³ *Glass v. Pullen*, 6 Bush (Ky.), 346; *Pennsylvania Bank v. Potius*, 10 Watts (Penn.), 148, 152; *Conwell v. McCowan*, 53 Ills. 363; *Darst v. Bates*, 51 Ills. 439; *Gilliam v. Esselman*, 5 Sneed (Tenn.), 86; *McConnell v. Beatie*, 34 Ark. 113; *Rushforth, ex parte*, 10 Ves. 409.

⁴ *Bridges v. Nicholson*, 20 Ga. 90; *Magee v. Leggett*, 48 Miss. 139; *Commonwealth v. Chesapeake & Ohio Canal Co.*, 32 Md. 501; *Kyner v.*

Kyner, 6 Watts (Penn.), 221; *Stamford Bank v. Benedict*, 15 Conn. 437; *Field v. Hamilton*, 45 Vt. 35; *Vert v. Voss*, 74 Ind. 566; *Harlan v. Sweeny*, 1 Lea (Tenn.), 682.

⁵ *Neptune Ins. Co. v. Dorsey*, 3 Md. Ch. Dec. 334; *S. C. nom. Swan v. Patterson*, 7 Md. 164; *Union Bank v. Edwards*, 1 Gill & J. (Md.) 346; *Wileox v. Fairhaven Bank*, 7 Allen (Mass.), 270; *Hopkinsville Bank v. Rudy*, 2 Bush (Ky.), 326; *Cooper v. Jenkins*, 32 Beav. 337; *Farebrother v. Wodehouse*, 23 Beav. 18.

⁶ *Postea*, § 130.

⁷ *Rice v. Downing*, 12 B. Mon. (Ky.) 44; *Lee v. Griffin*, 31 Miss. 632.

thereon.¹ The payment need not be in one sum, but may be made at different times;² nor need it be wholly or at all in money, if the creditor accepts something else; though, as has been already stated, if it be not in money, the surety's right will extend only to his reimbursement for the real value of what he has paid.³ It has been held in Missouri that a surety for part of the indebtedness of his principal becomes entitled, by paying the part for which he is liable, to a *pro rata* or proportionate share of the proceeds arising from a sale of the debtor's property, and may be subrogated accordingly to the rights of the other creditors, so as to have the benefit of all their securities;⁴ but this is contrary to the general doctrine.⁵

§ 128. **Satisfaction is Creditor's Right; it need not come wholly from Surety.** — It is the creditor who is entitled to satisfaction; and neither the debtor nor any other creditors can object to any arrangement between the surety and the creditor to whom he is liable for the subrogation of the surety, whether the latter has or has not completely satisfied the debt.⁶ If the surety has satisfied the creditor partly by a set-off of the creditor's own obligations, and only partly in money, his right of subrogation will yet extend to the whole of the indebtedness which he has satisfied.⁷ If the principal debtor has himself paid part of the indebtedness, and the surety only the balance, yet, when once the creditor is wholly satisfied, the same principle of equity which substitutes the surety who has paid the whole debt to the place of the creditor will equally extend and apply to the surety paying a part thereof, to the extent of his payment.⁸ A partial payment is sufficient to establish the

¹ Gannett v. Blodgett, 39 N. H. 150.

⁴ Allison v. Sutherland, 50 Mo. 274.

⁵ Child v. New York & New England R. R. Co., 129 Mass. 170.

² Davies v. Humphreys, 6 M. & W. 153; Bullock v. Campbell, 9 Gill (Md.), 182; Williams v. Williams, 5 Ohio, 444; Hall v. Hall, 10 Humph. (Tenn.) 352; Pickett v. Bates, 3 La. Ann. 627.

⁶ Motley v. Harris, 1 Lea (Tenn.), 577; Spaulding v. Crane, 46 Vt. 292; Gedye v. Matson, 25 Beav. 310.

⁷ Keokuk v. Love, 31 Iowa, 119.

⁸ Hess's Estate, 69 Penn. St. 272; Magee v. Leggett, 48 Miss. 139;

³ *Antea*, § 105.

surety's right as against the principal;¹ it is only the creditor who can insist that the debt must be paid in full. Nor is it necessary that the surety's payment should be made in money; whatever is accepted by the creditor as a payment, so as to discharge the principal debtor from his liability, will operate as a payment in favor of the surety.² But until the creditor has been paid in full, the surety cannot, against the will of the creditor, in any manner, interfere with the latter's rights or securities, so as to put him to any embarrassment in collecting the remainder of his demand.³

§ 129. **Creditor's Right to apply Security held for Several Debts until all are satisfied.**—A creditor who holds security without special stipulations as to its application, for various sums due to him from his debtor, for some of which he also holds sureties, may, in case of the insolvency of the principal and of some of the sureties, apply the proceeds of the security upon such of the debts as may be necessary for his own protection; and solvent sureties upon others of the debts cannot in any way avail themselves of such security in equity, without paying or offering to pay the whole of the debts for which the security was given.⁴ So, where a debtor mortgaged two estates to a creditor as security for the payment of two distinct sums, with a surety for the payment of one of the sums only, the right of the creditor to retain both securities until the payment of both debts will override the right of the surety, upon his payment of the debt for which he is surety, to have the benefit of the security pledged for that debt.⁵ And where the principal debtor gave to his creditor both a mortgage

Hardcastle v. Commercial Bank, 1 Harringt. (Del.) 374, *note*.

¹ Gedy v. Matson, 25 Beav. 310.

² Knighton v. Curry, 62 Ala. 404; *antea*, §§ 105, 127.

³ New Jersey Midland R. R. Co. v. Wortendyke, 27 N. J. Eq. 658; Hollingsworth v. Floyd, 2 Harr. & Gill (Md.), 87.

⁴ Wilcox v. Fairhaven Bank, 7 Allen (Mass.), 270; Richardson v. Washington Bank, 3 Met. (Mass.) 536; Allen v. Culver, 3 Denio (N. Y.), 285; Stone v. Seymour, 15 Wend. (N. Y.) 19; Union Bank v. Edwards, 1 Gill & J. (Md.) 346.

⁵ Farebrother v. Wodehouse, 23 Beav. 18.

and a covenant by a surety to secure the payment of the debt, and then gave the creditor a further charge upon the mortgaged property to secure a further loan, it was held that the surety was not entitled to the benefit of the first mortgage without paying the second loan as well as the debt for which he was surety.¹ As the doctrine of subrogation is founded upon principles of reason and justice, and not upon any contract or stipulation between the parties, it follows as a necessary consequence that the surety is not to be substituted to the place of the creditor, unless upon the circumstances of the case it is shown to be just and proper that he should be. Hence, it is obvious that in order to become entitled to such substitution he must first pay the whole of the debt or debts for which the property is mortgaged, or the collateral security given to the creditor; for it would be manifestly unjust, and a plain violation of the creditor's rights, to compel him to relinquish any portion of the property before the obligation for the performance of which it had been conveyed to him has been fully complied with.² But in New York, if a creditor, holding a claim for which he has both collateral security from the principal debtor and also the engagement of a surety, acquires an additional claim against the same principal, to which the agreement upon which the security was taken does not extend, the surety will be entitled to the benefit of such security on payment of the first indebtedness alone, and can require the proceeds of such security, when realized by the creditor, to be applied upon the first indebtedness; for the surety's right of subrogation, when once vested, cannot be interfered with by the act of the creditor alone.³

§ 130. Surety may come into Equity to compel Payment of the Debt by the Principal. — A surety, after the debt has

¹ *Williams v. Owen*, 13 Sim. 597.

² *Merrick, J.*, in *Wilcox v. Fairhaven Bank*, 7 Allen (Mass.), 270, 272, citing *Richardson v. Washington Bank*, 3 Met. (Mass.) 536; *Copis v. Middle-*

ton, Turn. & Russ. 224; *Hodgson v. Shaw*, 3 Myl. & K. 183.

³ *National Exchange Bank v. Silliman*, 65 N. Y. 475.

become due, although he has not paid it, may, if the creditor refuses or neglects to enforce his demand against the principal debtor by proper legal proceedings, come into a court of equity, bringing both the debtor and the creditor before the court, and have a decree compelling the debtor to make payment, and thus to exonerate the surety from his liability;¹ and if the creditor is fully indemnified, subjected to no delay, and exposed to no risk of loss, he may, upon such a bill, be compelled to resort to the property of the principal for the satisfaction of his claim before coming upon the surety;² and upon such a bill the surety may have any property which has been specifically appropriated for the payment of the debt by or for the principal debtor applied thereto for his indemnity.³ So the surety may for his relief have the debt proved against the estate of the principal in bankruptcy.⁴ But the surety cannot ask for the use of the securities and remedies held by the creditor to enforce payment from the principal, without tendering to the creditor an indemnity against any costs and expenses.⁵ And when sureties who are claiming in a court of equity the benefit of subrogation have not yet paid the creditor, though a judgment has been recovered against them, it has been held that the court may, in the exercise of its equitable jurisdiction to

¹ *Norton v. Reid*, 11 So. Car. 593; *Towe v. Newbold*, 4 Jones Eq. (Nor. Car.) 212; *Crooue v. Bivens*, 2 Head (Tenn.), 339; *Washington v. Tait*, 3 Humph. (Tenn.) 543; *Howell v. Cobb*, 2 Coldw. (Tenn.) 104; *Gilliam v. Esselman*, 5 Sneed (Tenn.), 86; *Hannay v. Pell*, 3 E. D. Smith (N. Y.), 432; *Hayes v. Ward*, 4 Johns. Ch. (N. Y.) 123; *Irick v. Black*, 17 N. J. Eq. 189; *Pride v. Boyce*, Rice Eq. (So. Car.) 276, 287; *Tankersly v. Anderson*, 4 Desaus. Eq. (So. Car.) 44; *McConnell v. Scott*, 15 Ohio, 401; *Purviance v. Sutherland*, 2 Ohio St. 478; *Stump v. Rogers*, 1 Hammond (Ohio), 533; *Ritinour v. Matthews*, 42 Ind. 7; *Bishop v. Day*, 13 Vt. 81;

Wetzel v. Sponsler, 18 Penn. St. 460; *Ruddell v. Childress*, 31 Ark. 511; *Stevenson v. Taveners*, 9 Gratt. (Va.) 398; *Whitridge v. Durkee*, 2 Md. Ch. Dec. 442.

² *Thompson v. Taylor*, 72 N. Y. 32; *Hayes v. Ward*, 4 Johns. Ch. (N. Y.) 123; *Irick v. Black*, 17 N. J. Eq. 189; *Huey v. Pinney*, 5 Minn. 310.

³ *Wooldridge v. Norris*, L. R. 6 Eq. 410.

⁴ *Babcock, in re*, 3 Story C. C. 393; *Wright v. Austin*, 56 Barb. (N. Y.) 13, 17; *Rushforth, ex parte*, 10 Ves. 409.

⁵ *Beardsley v. Warner*, 6 Wend. (N. Y.) 610.

declare future rights and duties, order that the sureties be subrogated to the rights of the creditor when they shall have paid the claim.¹

§ 131. **Rights of Successive Sureties to Subrogation against each other.**—A surety who first becomes such in an obligation incidental to the prosecution of a legal remedy against the principal will, upon paying the debt, be allowed to stand in the creditor's place only as to his remedies against the person or property of the principal;² as to any prior surety, or any prior interest in property which may be pledged to the creditor for the debt, he must occupy the position of the debtor;³ he cannot claim to be subrogated to the rights of the creditor against any prior sureties;⁴ on the contrary, the prior surety, if compelled to pay the debt, will be subrogated against the subsequent surety.⁵ Those who last become sureties do so, not only for the benefit of the creditor, but in exoneration of the former sureties, and will be liable to indemnify such former sureties.⁶ Accordingly, if, after a judgment against two, one of whom appears by the record to be a surety only, a third party intervenes, solely at the request of the principal, and becomes bail for the stay of execution, taking indemnity from the principal therefor, and at the expiration of the stay the original surety is compelled to pay the judgment, he may, by subrogation thereto, recover the amount thereof from such bail.⁷ One who becomes surety for the principal in the course of legal proceedings against him has no right of contribu-

¹ *Keokuk v. Love*, 31 Iowa, 119.

² *Riemer v. Schlitz*, 49 Wisc. 273.

³ *Armstrong's Appeal*, 5 Watts & Serg. (Penn.) 352; *Hopkinsville Bank v. Rudy*, 2 Bush (Ky.), 326; *Crow v. Murphy*, 12 B. Mon. (Ky.) 414; *Bohannon v. Coombs*, 12 B. Mon. (Ky.), 563; *Patterson v. Pope*, 5 Dana (Ky.), 241; *Yoder v. Briggs*, 3 Bibb (Ky.), 228.

⁴ *Hammock v. Baker*, 3 Bush (Ky.), 208; *Smith v. Bing*, 3 Ohio, 33.

⁵ *Kellar v. Williams*, 10 Bush (Ky.) 216.

⁶ *Chrisman v. Jones*, 34 Ark. 73.

⁷ *Schnitzel's Appeal*, 49 Penn. St. 23; *Burns v. Huntington Bank*, 1 Pen. & W. (Penn.) 395; *Pott v. Nathans*, 1 Watts & Serg. (Penn.) 155; *Winchester v. Beardin*, 10 Humph. (Tenn.) 247; *Hauner v. Douglass*, 4 Jones Eq. (Nor. Car.) 262.

tion against a prior surety for the debt;¹ but, on the contrary, the latter is entitled to be subrogated to the creditor's rights against him as in the case of bail.² The rights of a surety on a second appeal must yield to those of a surety on the first appeal of the same case, both being sureties for the same principal.³ And one who, by becoming a surety on a judgment-bond, has prevented a sale of the debtor's property ought not to be substituted to the lien of the creditor, so as to overreach a junior lien created before the surety became liable;⁴ nor can such a subsequent surety, after having paid the judgment, claim by subrogation the benefit of a mortgage given by the principal debtor to the original surety for the latter's indemnity.⁵

§ 132. **Rights of one who becomes Surety for the Payment of a Judgment.** — Where the payee of a promissory note commenced a suit against the three makers thereof, and while the suit was pending made an agreement with A, one of these makers, by which A was to pay a certain sum upon the note, and the creditor should take judgment for the balance against the three, but should not enforce his judgment against A, and A made the payment accordingly, and the creditor subsequently collected his judgment from the bail of another of the defendants, and in pursuance of an order of the county court the bail took an assignment of the judgment from the creditor, and subsequently collected the amount of this judgment from A,⁶ it was held that the creditor was not responsible for this act of the bail after the assignment of the judgment had been made by order of the court, and that A could not maintain an action against the creditor upon the agreement not to

¹ *Daniel v. Joyner*, 3 Ired. Eq. (Nor. Car.) 513; *Dent v. Wait*, 9 W. Va. 41; *Hammock v. Baker*, 3 Bush (Ky.), 77, 208.

² *Bender v. George*, 92 Penn. St. 36; *Chaffin v. Campbell*, 4 Sneed (Tenn.), 184; *Brandenburg v. Flynn*, 12 B. Mon. (Ky.) 397.

³ *Hinckley v. Kreitz*, 58 N. Y. 583.

⁴ *Fishback v. Bodman*, 14 Bush (Ky.), 117.

⁵ *Havens v. Foudry*, 4 Met. (Ky.) 247.

⁶ See *Pierson v. Catlin*, 3 Vt. 272.

enforce payment from him ; and *Redfield, J.*, said that the county court had no power to order such subrogation of the bail to the rights of the creditor, and that at most the bail by such subrogation could acquire only those rights which the creditor had, and must take the judgment subject to the creditor's agreement not to enforce collection thereof against A, though A's only remedy to enforce compliance by the bail with this agreement would be in equity.¹ Where the original principal in the debt prosecuted a writ of error, which was overruled, and the surety or indorser of the note afterwards paid the debt, he was held to be entitled to have the judgment rendered on the writ of error against the original defendants and the sureties on the *supersedeas* bond assigned to him, upon the general principle that the surety is entitled to an assignment of all collaterals, and that the second sureties may, by becoming such, have put him in a worse condition ; and the court said that the latter sureties, having, at the instance of the principal, stipulated to pay the debt, suffered no injustice in being called upon to do so, since they were obliged to do no more than they undertook, and had no right to complain that they were not allowed to use as a payment by themselves the money which proceeded from another person, whom their principal was previously bound to save harmless. If the interposition of the second sureties might have been the means of involving the first surety in the necessity of paying the debt, the equity of the first surety decidedly preponderated.² If the interposition of the bail or the surety for the judgment is the means of hindering or delaying the payment of the debt, such second surety has less equity than a prior surety.³ The coming in of the bail, by delaying execution, may have prevented a payment by the debtor or out of his funds. As between the bail and the principal debtor merely, the former may be subrogated to the rights of the judgment-creditor ;

¹ *Pierson v. Catlin*, 18 Vt. 77.

² *Burns v. Huntington Bank*, 1

³ *Mitchell v. De Witt*, 25 Tex. Pen. & W. (Penn.) 395 ; *Pott v. Nathans*, 1 Watts & Serg. (Penn.) 155.

Sup. 180.

but regard must always be had for third persons whose rights might be affected by such subrogation.¹ A guarantor is not liable to contribute to indemnify a surety;² they are not co-sureties.³

§ 133. **Where Later Surety is Surety for Original Sureties as well as for Principal.** — If, however, the subsequent surety is fairly to be regarded as a surety for the original sureties, as well as for the principal, then he is entitled to subrogation against the original sureties as well as against the principal.⁴ Thus, where, after a judgment had been recovered against both principal and sureties, a third person agrees with the creditor to become surety for the payment of the debt, upon an agreement with the creditor that such new surety shall have the benefit of the judgment for his satisfaction and indemnity, he has a superior equity over the old sureties, and may enforce the collection of the judgment against them for his own protection; his agreement made him the conditional assignee of the judgment.⁵ The same principle has been applied to the sureties upon a bond⁶ and upon a note.⁷ So, if a judgment against two is affirmed on their appeal against them and their surety on the appeal, and on further appeal is again affirmed against the three and their surety on the second appeal, the first and second surety are related to each other, not as co-sureties, but as principal and surety; and if the first surety pays the final judgment he has no recourse against the second.⁸ And if a judgment against a principal debtor and his sureties is superseded by the defendants with two others as their sureties, all the defendants in the original judgment

¹ *Armstrong's Appeal*, 5 Watts & Serg. (Penn.) 352; *United States Bank v. Winston*, 2 Brock. (C. C.) 252; *Barlow v. Deibert*, 39 Ind. 16.

² *Longley v. Griggs*, 10 Pick. (Mass.) 121.

³ *Hamilton v. Johnson*, 82 Ill. 39.

⁴ *Dillon v. Scofield*, 11 Nebraska, 419.

⁵ *La Grange v. Merrill*, 3 Barb. Ch. (N. Y.) 625.

⁶ *Whiting v. Burke*, L. R. 6 Ch. 342; *Harrison v. Lane*, 5 Leigh (Va.), 414.

⁷ *Adams v. Flanagan*, 36 Vt. 400; *Harris v. Warner*, 13 Wend. (N. Y.) 400.

⁸ *Cowan v. Duncan*, Meigs (Tenn.), 470.

are principals as to the sureties in the *supersedeas* judgment.¹

§ 134. **Exceptions to Usual Rule of Subrogation between Successive Sureties.**—In Louisiana it has been held, contrary to the general rule, that the second surety is entitled to subrogation against the first surety, on the presumption that the second surety was induced to bind himself in consequence of the responsibility of the principal having been guaranteed by the first surety; and accordingly the surety in an appeal-bond, after paying the amount of a judgment against his principal, was allowed to take out an execution upon the judgment against the original bail in the suit for the whole amount so paid by him.² In Virginia a surety who becomes such in the course of judicial proceedings for the collection of the debt from the principal is treated like any other surety for the debt, and is subrogated to all the remedies of the creditor, even against third persons, whose rights, though subject to the creditor's lien, have accrued before the obligation of the surety was entered into; he will be subrogated to the creditor's judgment-lien upon lands alienated by the debtor after the judgment, but before the surety became such.³ Where, on an appeal from a judgment, a new judgment was rendered for a much larger sum, and was paid by the surety in the appeal-bond, this surety was subrogated to the creditor's judgment-lien on the debtor's real estate, including that which had been alienated in the mean time, not only for the amount of the original judgment, but also for the increased amount which the surety had been compelled to pay.⁴ But a judgment-surety for the principal debtor will not be subrogated to the creditor's lien upon the property of one who stands in the posi-

¹ *Smith v. Anderson*, 18 Md. 520; *Hartwell v. Smith*, 15 Ohio St. 200. See *Monson v. Drakeley*, 40 Conn. 552.

² *Howe v. Frazer*, 2 Rob. (La.) 424.

³ *Hill v. Manser*, 11 Gratt. (Va.) 522; *Rodgers v. McCluer*, 4 Gratt. (Va.) 81; *Leake v. Ferguson*, 2 Gratt. (Va.) 419.

⁴ *McLung v. Beirne*, 10 Leigh (Va.), 394.

tion of a prior surety for the judgment-debtor.¹ In Massachusetts it has been held that the doctrine of subrogation does not apply at all to the case of successive sureties taken in the course of judicial proceedings against the principal debtor; and neither the prior nor the subsequent surety is allowed any remedy against the other.² The same rule has been followed in Maine.³ And in Maryland it has been said that the principles of contribution between co-sureties are not to be applied to such successive sureties.⁴

§ 135. **Whether Original Obligation extinguished by Surety's Payment thereof. Rule in England.** — Although it is a general rule that in equity a surety is subrogated to the benefit of all the securities for the debt which the creditor holds against the principal, yet it was finally settled by judicial decision in England that this rule must be qualified by considering it as applying to such securities only as continue to exist and are not *ipso facto* extinguished by the act of payment,⁵ and that payment of a bond or other specialty or of a judgment executed by or recovered against both principal and surety, or the principal alone, extinguished the obligation, so as to prevent any subrogation of the surety thereto.⁶ But the technical reasoning on which these decisions rested, never entirely satisfactory, has now been done away with in England by a statutory provision, that "every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him or to a trustee for him every judgment, specialty, or other security, which shall be held by the creditor in respect of such debt or duty, whether such

¹ Douglass v. Fagg, 8 Leigh (Va.); 588.

² Holmes v. Day, 108 Mass. 563.

³ Morse v. Williams, 22 Maine, 17.

⁴ Semmes v. Naylor, 12 Gill & J. (Md.) 358.

⁵ Copis v. Middleton, Turn. & Russ. 224.

⁶ Jones v. Davids, 4 Russ. 277; Copis v. Middleton, Turn. & Russ. 224; Armitage v. Baldwin, 5 Beav. 278; Dowbiggin v. Bourne, 2 Yo. & Co. Exch. 462; Hodgson v. Shaw, 3 Mylne & K. 183.

specialty, judgment, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty ; and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and if need be, and upon a proper indemnity, to use the name of the creditor in any action or other proceeding at law or in equity, in order to obtain from the principal debtor, or from any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the loss sustained and advances made by the person who shall have so paid such debt or performed such duty ; and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him : provided always that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between the parties themselves, such last-mentioned parties shall be justly liable.”¹ This statute will be applied for the protection of a co-surety or co-debtor from whom payment has been coerced by the creditor on execution,² and is held to be applicable to a contract made before the passage of the statute, where the breach of the contract has taken place and the payment by the surety or co-debtor has been made after its passage.³

§ 136. **Present English Rule generally adopted in the United States.** — With more or less aid from legislation, the rule laid down in this statute has been pretty generally adopted in the United States; and the distinction that equity will not subrogate the sureties in those cases in which payment discharges or extinguishes the security at law, such as bonds and judgments which bind the principal and the surety jointly, or bonds or judgments which constitute or merge the debt,

¹ Mercantile Law Amendment Act, 19 & 20 Vic., c. 97, § 5.

² Cochran's Estate, L. R. 5 Eq. 209; Lockhart v. Reilly, 1 De Gex &

³ Batchellor v. Lawrence, 9 C. B. Jones, 464.
N. S. 543.

although the surety be not bound by them, has not been generally followed in this country.¹ As was said by *Nisbet, J.*, in deciding that a surety who had paid a bond debt of his principal was, by subrogation to the rights of the creditor, entitled to rank as a specialty creditor of his principal, "the substitution of the surety is not for the creditor as he stands related to the debtor after the payment, but as he stood related to him before the payment. He is subrogated to such rights as the creditor then had against the principal, one of which unquestionably was to enforce his bond against the principal, and, if he was insolvent, to be let in as a bond-creditor. What difference is there between permitting the surety to reimburse himself out of a mortgage-lien held by the creditor, and permitting him to take out of the estate generally of the debtor the amount that he has paid? If he realizes upon the mortgage, he abstracts the amount which he has paid from the estate of the principal; if he realizes on the bond, the mortgaged property goes back into the common fund, and the result to him and the other creditors is the same. The very fact that the surety could not enforce the bond at law is a reason in equity why he should be allowed to come into the distribution as a bond-creditor."²

§ 137. **Right of Surety to be substituted to the Benefit of the Original Obligation maintained.**—In the following States this right of the surety has been more or less distinctly affirmed.

In *New Hampshire*, it is held that though payment of a joint debt by either of the debtors is a discharge of the debt and of any action, judgment, or execution founded upon it, yet, if the debt is paid by a surety, and the creditor upon his payment assigns to him any collateral security, the debt will be regarded as still subsisting and undischarged, so far as is necessary to protect the security. And an attachment of the property of the principal in an action pending for the recovery of the debt

¹ Am. note to *Dering v. Winchel-*
sea, 1 Lead. Cas. Eq. 434.

² *Nisbet, J.*, in *Lumpkin v. Mills*,
4 Ga. 343, 349.

is such a collateral security ; and accordingly the surety, after his payment, may take an assignment of such an action, prosecute it to judgment, and take out execution thereon for his own use.¹ And if a joint and several promissory note is taken up by one of the signers thereof who is merely a surety, not with the intention to pay and discharge it, but to purchase it, this will not be a discharge of the debt, and an action may still be maintained upon the note in the name of the payee for the benefit of the real plaintiff.²

Nebraska. — The New Hampshire rule as to an attachment pending against the principal when payment is made by a surety has been followed in Nebraska.³

In *New York*, it is maintained that a surety upon the performance of his contract is entitled to the original evidences of indebtedness held by the creditor and to any judgment in which the debt has been merged ; the right of the surety is not only that of subrogation pure and simple, but also a right to an assignment from the creditor ; and though performance of the conditions of the suretyship discharges the obligation so far as concerns the existence of any interest of the creditor therein, yet the original debt is kept alive for the benefit of the surety, for the purpose of enforcing his rights and interests against the principal debtor.⁴ A surety paying a judgment against himself and his principal has the right to have it assigned to himself, and may then enforce it against the principal or his estate.⁵ This rule was originally restricted to equity,⁶ but is now applied also at law.⁷

¹ *Brewer v. Franklin Mills*, 42 N. H. 292; *Edgerly v. Emerson*, 23 N. H. 555. *Clason v. Morris*, 10 Johns. (N. Y.) 524.

² *Rockingham Bank v. Claggett*, 29 N. H. 292. ⁵ *Goodyear v. Watson*, 14 Barb. (N. Y.) 481; *Townsend v. Whitney*, 15 Hun (N. Y.), 93; S. C. 75 N. Y. 425.

³ *Wilson v. Burney*, 8 Nebraska, 39. ⁶ *Ontario Bank v. Walker*, 1 Hill (N. Y.), 652, and reporter's note, citing *New York Bank v. Fletcher*, 5

⁴ *Townsend v. Whitney*, 75 N. Y. 425; *Fielding v. Waterhouse*, 8 Jones & Spencer (N. Y.), 424; *Cuyler v.*

Ensworth, 6 Paige (N. Y.), 32; ⁷ *Alden v. Clark*, 11 How. Pr. (N. Y.) 209.

In *Pennsylvania*, a surety who has paid a debt secured by a judgment against his principal, and who is in other respects entitled to subrogation, may revive the judgment without first obtaining a decree of substitution, and may have his rights tried on a *scire facias*,¹ even though an entry of satisfaction has been made upon the judgment, if this was not done at the instance of the surety.² Actual payment discharges a judgment or other incumbrance at law, but, where justice requires it, it is still kept on foot for the protection of the surety who has paid it.³ He will be subrogated to all the creditor's rights in the original obligation which he has paid,⁴ not only against his principal for indemnity, but against his co-sureties for contribution.⁵

In *Delaware*, under the statutes of that State, the surety upon a bond, on tender of the debt, is entitled, if he demands it, to an assignment of the bond, that he may enforce it against the principal.⁶

In *Maryland*, a surety, upon paying a judgment-debt of the principal, may in equity compel the creditor to assign to him the judgment, with all liens given by the principal debtor to secure its payment.⁷ The payment in full by the surety will of itself operate as an assignment, so as to enable him to use the name of the creditor for the recovery of the money from the principal,⁸ or to levy the execution for his own use upon the property of the principal;⁹ and though a partial payment by the surety will not operate as an assignment *pro tanto*,¹⁰ so

¹ Cottrell's Appeal, 23 Penn. St. 294; Richter v. Cummings, 60 Penn. St. 441; Cochran v. Shields, 2 Grant (Pa. Cas.), 437.

² Bailly v. Brownfield, 20 Penn. St. 41.

³ Woodward, J., in Cottrell's Appeal, 23 Penn. St. 294, 295; Fleming v. Beaver, 2 Rawle (Penn.), 128.

⁴ Wright v. Grover & Baker S. M. Co., 82 Penn. St. 80.

⁵ Springer v. Springer, 43 Penn. St. 518.

⁶ Merriken v. Godwin, 2 Del. Ch. 236.

⁷ Creager v. Brengle, 5 Harr. & J. (Md.) 234.

⁸ Hollingsworth v. Floyd, 2 Harr. & Gill (Md.), 87, 91.

⁹ Sotheren v. Reed, 4 Harr. & J. (Md.) 307.

¹⁰ *Antea*, § 127; Hollingsworth v. Floyd, 2 Harr. & Gill (Md.), 91.

as to entitle him to exercise any control over the judgment or execution, yet it will not discharge the principal, to the prejudice of the rights of the surety, without the latter's consent, and will give the surety, to the extent of his payment, an equitable interest in the judgment, which he may release or transfer.¹

In *Virginia*, payment by a surety of a judgment against himself and his principal does not extinguish the judgment, as between the principal and the surety, but the surety will be subrogated to all the liens and remedies which the creditor had by reason of his judgment,² and which have not been already lost;³ and the same rule is applied to specialties or other obligations.⁴ Nor will the surety lose this right by having taken other security from his principal.⁵

In *North Carolina*, a surety who pays a judgment for the debt recovered against his principal has an equity against the creditor to have the judgment assigned to a trustee for his reimbursement, and may pursue the bail of his principal,⁶ even though a receipt be given by the creditor to the principal.⁷ But the surety, to protect his rights, must take such an assignment; if he does not, the debt will be extinguished, both as to his principal and himself.⁸ And the assignment must not be made to himself, but to one who was not a party to the record.⁹ Such an assignment will preserve the original obligation, and enable the surety to enforce all the remedies which the creditor

¹ *Grove v. Brien*, 1 Md. 438.

² *Leake v. Ferguson*, 2 Gratt. (Va.) 419; *Hill v. Manser*, 11 Gratt. (Va.) 522; *Watts v. Kinney*, 3 Leigh (Va.), 272; *Rodgers v. McCluer*, 4 Gratt. (Va.) 81; *McLung v. Beirne*, 10 Leigh (Va.), 394.

³ *Carr v. Glascock*, 3 Gratt. (Va.) 343.

⁴ *Lidderdale v. Robinson*, 12 Wheaton, 594; *Tinstry v. Oliver*, 5 Munf. (Va.) 419; *Powell v. White*,

11 Leigh (Va.), 309; *Eppes v. Randolph*, 2 Call (Va.), 125.

⁵ *Miller v. Pendleton*, 4 Hen. & Munf. (Va.) 436.

⁶ *Hanner v. Douglass*, 4 Jones Eq. (Nor. Car.) 262.

⁷ *Newbern v. Dawson*, 10 Ired. Law (Nor. Car.), 436.

⁸ *Bledsoe v. Nixon*, 68 Nor. Car. 521; *Sherwood v. Collier*, 3 Dev. Law (Nor. Car.), 380.

⁹ *Briley v. Sugg*, 1 Dev. & Bat. Eq. (Nor. Car.) 366.

might have used against the principal.¹ The surety upon a specialty debt, who has paid it, will be deemed a specialty creditor, both of his principal and of his co-sureties.²

In *South Carolina*, a surety who pays a judgment recovered against himself and his principal, or a specialty executed by himself and his principal, does not thereby extinguish it, but may in equity enforce it against his principal's estate,³ though the distinction of *Copis v. Middleton*⁴ has been affirmed as between co-sureties.⁵ But the lien of a judgment which has been paid by one surety has been kept alive for his protection against the insolvent estate of his co-surety.⁶ Where separate judgments had been obtained against principal and surety for the same debt, and the latter paid the judgment against himself, and thereupon the sheriff entered satisfaction upon both judgments, the surety was allowed to vacate this entry upon the judgment against the principal, and to set it up as a lien upon his estate.⁷

In *Georgia*, a surety who has paid the debt of his principal is, upon the equity which springs out of the relation of principal and surety, and the fact of his payment, subrogated to all the remedies of the creditor, and in the distribution of the assets of the debtor is entitled to occupy the place of and be substituted for the creditor upon the original evidence of the debt;⁸ and the surety upon his payment of the debt may require an assignment thereof from the creditor.⁹ If a surety

¹ *Hodges v. Armstrong*, 3 Dev. Law (Nor. Car.), 253; *Brown v. Long*, 1 Ired. Eq. (Nor. Car.) 190.

² *Howell v. Reams*, 73 Nor. Car. 391; *Drake v. Coltraine*, 1 Busbee (Nor. Car.), 300; Stat. Nor. Car. 1928, c. 110, § 4.

³ *Thompson v. Palmer*, 3 Rich. Eq. (So. Car.) 139; *King v. Angh-trey*, 3 Strobb. Eq. (So. Car.) 149; *Ware, ex parte*, 5 Rich. Eq. (So. Car.) 473; *Smith v. Swain*, 7 Rich. Eq. (So. Car.) 112; *Schnltz v. Carter*, Speers Eq. (So. Car.) 534.

⁴ *Copis v. Middleton*, Turn. & Rnss. 224.

⁵ *So. Car. Bank v. Adger*, 2 Hill Eq. (So. Car.) 262; *Cunningham v. Smith*, Harp. Eq. (So. Car.) 90.

⁶ *Burrows v. McWhann*, 1 Desaus. Eq. (So. Car.) 409.

⁷ *Perkins v. Kershaw*, 1 Hill Eq. (So. Car.) 344.

⁸ *Lumpkin v. Mills*, 4 Ga. 343.

⁹ *McDonald v. Dougherty*, 14 Ga. 674.

pays a judgment rendered against himself and his principal, he is entitled to the control of such judgment and of the execution thereon,¹ and this right will pass upon his decease to his personal representatives.² But this right is in equity, not at law;³ and where, pending a suit brought jointly against the maker and the indorser of a promissory note, the indorser paid the note, it was held that this payment, made before judgment, barred the further prosecution of the suit, even at the instance and for the benefit of the indorser; his remedy was in his own name.⁴

In *Ohio*, a surety who pays a judgment rendered against himself and his principal will be subrogated to the rights therein of the creditor; this payment will not operate as an extinguishment of the judgment for the benefit of the principal.⁵ If one of several co-sureties pays a judgment against them, with the intention of saving his right to be subrogated to the remedies of the judgment-creditor, he may afterwards maintain an action to be subrogated to the judgment, notwithstanding its legal extinction; and such intention will be presumed on his part from the bare fact of payment until the contrary is shown.⁶ The remedy against the co-surety is limited to six years, like a simple contract;⁷ that against the principal is extended to ten years.⁸

In *Kentucky*, a surety advancing to the creditor the amount of a judgment against his principal may stipulate for substitution and the control of the judgment and execution against his principal for his reimbursement; and a court of law will protect him therein.⁹ And under the statutes of Kentucky a surety, upon paying the amount of a judgment against himself and his principal, may compel the creditor to assign the judg-

¹ *Davenport v. Hardeman*, 5 Ga. 580. *Dempsey v. Bush*, 18 Ohio St. 376; *Neilson v. Fry*, 16 Ohio St. 552.

² *Harris v. Wynne*, 4 Ga. 521.

⁶ *Neilson v. Fry*, 16 Ohio St. 552.

³ *Elam v. Rawson*, 21 Ga. 139.

⁷ *Neilson v. Fry*, *supra*.

⁴ *Griffin v. Hampton*, 21 Ga. 198.

⁸ *Neal v. Nash*, 23 Ohio St. 483.

⁵ *Neal v. Nash*, 23 Ohio St. 483;

⁹ *Morris v. Evans*, 2 B. Mon.

(Ky.) 84.

ment to himself.¹ So, if the surety has paid, as such, a preferred debt of the principal, he is entitled to the benefit of the preference.² But a person who has as surety of an intestate paid a judgment or specialty debt of his, does not thereby become, *ipso facto* and without an assignment, a judgment or specialty creditor of the estate; he is *prima facie* a simple-contract creditor merely.³

In *Tennessee*, a surety who pays a judgment against his principal is subrogated to the judgment lien and all the rights of the creditor against the principal.⁴ Even a partial payment by the surety will give him *pro tanto* the rights of a judgment-creditor as against his principal.⁵ The payment by one who stands in the relation of surety, though it may destroy the remedy or extinguish the security so far as the creditor is concerned, has not that effect between the principal and the surety. As to the surety, it operates in equity as an assignment of the debt and of all legal remedies upon it; and in favor of the surety the debt and all its legal obligations are regarded as subsisting. The surety is not subrogated to the rights of the judgment-creditor in such a sense as that an execution can be issued on the judgment in his favor as an assignee of the judgment; but he may be substituted to the lien which the judgment-creditor had upon the property of the principal and to all the remedies of the creditor.⁶

In *Mississippi*, a surety who has paid a judgment for his principal is in equity entitled to be subrogated to all the rights of the creditor in the judgment; but at law his payment extinguishes the judgment, and he becomes merely a simple-contract creditor of the principal.⁷

¹ *Veach v. Wickersham*, 11 Bush (Ky.), 261; *Alexander v. Lewis*, 1 Met. (Ky.) 407.

² *Schofield v. Rudd*, 9 B. Mon. (Ky.) 291.

³ *Buckner v. Morris*, 2 J. J. Marsh. (Ky.) 121.

⁴ *McNairy v. Eastland*, 10 Yerg. (Tenn.) 310.

⁵ *Williams v. Tipton*, 5 Humph. (Tenn.) 66.

⁶ *Deaderick, J.*, in *Bittick v. Wilkins*, 7 Heisk. (Tenn.) 307 *et seq.*

⁷ *Dinkins v. Bailey*, 23 Miss. 284; *Conway v. Strong*, 24 Miss. 665.

In *Michigan*, the payment of a judgment by a surety, with the intent to avail himself, by way of subrogation, of the lien of the judgment, will not operate in equity to extinguish the debt or to destroy the force of a levy upon the execution. Equity will enforce the right of subrogation by keeping the debt alive and preserving the force of the levy for the protection of the surety.¹

In *Iowa*, the surety on his payment is subrogated to the rights of the creditor in the original obligation, and may enforce the same as of the class to which it originally belonged ;² but his right of subrogation is not available until enforced by proper legal proceedings seasonably brought.³

In *Indiana*, though the surety will be subrogated to all the rights of the creditor in the original obligation by having it properly assigned to himself,⁴ yet, when a judgment is rendered jointly against two, they are both to be regarded as principals, unless by proof *aliunde* one of them is shown to be a surety for the other ; and when one of such defendants, claiming to be merely a surety, but without any judicial determination as to his suretyship, pays the judgment, he cannot have execution thereon for his own use.⁵

In *Missouri*, a surety who pays the debt of his principal is entitled to an assignment of the instrument paid. Though his payment extinguishes the obligation so far as the creditor is concerned, this extinguishment will not extend to the rights which the surety has acquired by his payment. It still subsists for his benefit as against his principal.⁶ But the fact of suretyship must be judicially established ; his remedy is not a matter of course.⁷ So the lien of a judgment, though satisfied by one surety, will in equity be kept alive as between co-sureties.⁸

In *Arkansas*, when a surety pays a judgment rendered

¹ *Smith v. Rumsey*, 33 Mich. 183.

² *Brought v. Griffith*, 16 Iowa, 26.

³ *Johnston v. Belden*, 49 Iowa, 301.

⁴ *Manford v. Firth*, 68 Ind. 83.

⁵ *Laval v. Rowley*, 17 Ind. 36.

⁶ *Berthold v. Berthold*, 46 Mo. 557.

⁷ *Hull v. Sherwood*, 59 Mo. 172 ;

McDaniels v. Lee, 37 Mo. 204.

⁸ *Furnold v. Missouri Bank*, 44 Mo.

336.

jointly against his principal and himself, it is extinguished at law; and the surety can avail himself of it against his principal only in equity.¹

In *Texas*, the surety, upon his payment of the debt of the principal, is entitled, not only to the benefit of all the securities, both legal and equitable, which the creditor holds in pledge for the debt, but he has the right to be substituted for the creditor as to the very debt itself, and to have this assigned to him; and equity will regard that which ought to be done as done already, where this is necessary to sustain an action.²

In *Louisiana*, though it is considered that at the common law a surety is not subrogated to the rights of the creditor upon his paying a joint judgment against himself and his principal, but that the judgment is extinguished by such payment,³ yet under their practice a surety who pays a judgment recovered against the principal debtor is thereby subrogated to the rights of the creditor, and may issue an execution on the judgment in the name of the creditor for the recovery of the amount which as surety he has paid;⁴ and since the surety has an equitable interest in the payment of the demand by the principal, the creditor may permit an execution to issue at the instance of the surety.⁵

§ 138. **Right of the Surety to be subrogated to the Benefit of the Original Obligation denied.** — On the other hand, it has been maintained in some jurisdictions that, although the surety is entitled, upon his payment of the debt, to take by subrogation the benefit of all the securities which the creditor held for the debt, this does not mean that the original obligation, which is discharged by the payment, shall be assigned to or vested in the surety, but refers only to such securities as are collateral to the principal obligation.⁶ A judgment against principal

¹ *Newton v. Field*, 16 Ark. 216.

⁴ *Connelly v. Bourg*, 16 La. Ann.

² *Sublett v. McKinney*, 19 Tex. 108.

438; *Jordan v. Hudson*, 11 Tex. 82.

⁵ *Fluker v. Bobo*, 11 La. Ann. 609.

⁶ *Dennis v. Rider*, 2 McLean

³ *McKee v. Amonett*, 6 La. Ann. 207.

C. C. 451; *United States v. Preston*, 4 Wash. C. C. 446.

and surety is taken to merge that relation between the debtors,¹ and cannot, after a payment by the surety, be kept alive against the principal, for the benefit of the surety.² This rule is followed in

Vermont, where it is held that when a debt is paid and extinguished, though by a surety, all liens and securities taken or obtained in legal proceedings to enforce its collection are also extinguished.³

In *Massachusetts*, a debtor, whether principal or surety, who makes payment of a debt for which others are bound with him, thereby extinguishes its obligation, and can obtain indemnity or contribution from the other debtors only by an independent action against them.⁴

In *Alabama*, though it was at first held that an execution against the principal might be enforced for the benefit of a surety who had paid the judgment, if it was made to appear that the proceeding was for the benefit of the surety,⁵ it is now settled that after payment by the surety he cannot keep the judgment alive for his reimbursement, either against the principal or his co-sureties;⁶ even though he take an assignment of the judgment, he will have no remedy at law except as a simple-contract creditor of the principal.⁷ The surety can assert no lien by virtue of the instrument upon which he became surety, as that becomes *functus officio* by the payment of the debt which it secures.⁸

In *Nevada*, a surety who has paid a note and had it assigned to himself, though he may maintain an action against the principal debtor for his payment, has no remedy upon the note itself.⁹

¹ Findlay v. United States Bank, 2 McLean C. C. 44.

² McLean v. Lafayette Bank, 3 McLean C. C. 587.

³ Moore v. Campbell, 36 Vt. 361.

⁴ Adams v. Drake, 11 Cush. (Mass.) 504; Brackett v. Winslow, 17 Mass. 153; Hammatt v. Wyman, 9 Mass. 138.

⁵ Clemens v. Prout, 3 Stew. & P. (Ala.) 345.

⁶ Morrison v. Marvin, 6 Ala. 797; Preslar v. Stallworth, 37 Ala. 402.

⁷ Saunders v. Watson, 14 Ala. 198; Smith v. Harrison, 33 Ala. 706.

⁸ Foster v. Athenæum, 3 Ala. 302.

⁹ Frevert v. Henry, 14 Nevada, 191.

But the rule generally adopted, except in these States, is that a payment by a surety does not necessarily in equity extinguish the original obligation, as between the surety and his principal, but only so far as the rights of the creditor are concerned.¹

§ 139. **Indemnity held by a Surety discharged by his Release from Liability.**— When the surety receives from the principal debtor a mortgage conditioned for his indemnity, and he is subsequently discharged from his liability, the lien of the mortgage is extinguished.² If the original debt is paid, and the surety accordingly discharged, by the execution of a new note with a new surety, such a mortgage is extinguished; and it cannot be kept alive by an assignment thereof to the new surety,³ though, if it were a mortgage of personal property, a contemporaneous verbal agreement between the mortgagor, the mortgagee, and the new surety, that the mortgage should stand as security to the new surety, might of itself, as between the parties, constitute a valid mortgage of the property.⁴ If a surety who holds such a security becomes indebted to his principal upon a different transaction, and in consideration thereof assumes the payment of the debt for which he was a surety, this arrangement will release the security in his hands.⁵ But a mortgage given to a surety to indemnify him against loss will pass to a third person who has paid the money for the surety on the faith of an agreement that the mortgage should be assigned to him.⁶ And if the note which constituted the original indebtedness is, after having been protested for non-payment, paid out of the proceeds of a new note made by the mortgagor and indorsed by the mortgagee for that express purpose, the mortgage will not thereby be discharged, but will

¹ *Antea*, §§ 135, 136, 137.

⁴ *Brooks v. Ruff, supra.*

² *Newsam v. Finch*, 25 Barb. (N. Y.) 175; *Yelverton v. Sheldon*, 2 Sandf. Ch. (N. Y.) 481; *Hunter v. Richardson*, 1 Duvall (Ky.), 247.

⁵ *United States Bank v. Stewart*, 4 Dana (Ky.), 27.

⁶ *Brien v. Smith*, 9 Watts & Serg. (Penn.) 78; *Haven v. Foley*, 18 Mo.

³ *Bonham v. Galloway*, 13 Ills. 68; 136.

Brooks v. Ruff, 1 Ala. Sel. Cas. 409.

continue in force as a protection to the mortgagee against his liability upon the second note.¹ The mere change in the form of the debt does not discharge the security.²

§ 140. **Surety's Right of Subrogation against his Co-sureties.**

— One of two or more co-sureties who has paid the debt to their common creditor may be subrogated to the rights of that creditor against his co-sureties, to enable him to recover contribution from them.³ He will be subrogated as against his co-sureties in most of the States, as in England under the Mercantile Law Amendment Act,⁴ to all the rights and remedies of the creditor, and entitled to enforce all the creditor's liens, priorities, and means of payment, as well against his co-sureties as against the principal debtor.⁵ This right will pass to the creditors of a co-surety whose means of obtaining their demand have been lost by their debtor's property, upon which they had a subordinate lien, having been taken to pay the whole obligation of which his co-sureties should have paid a part,⁶ and to a grantee of one of the co-sureties, who, to save the property which he has purchased, has been obliged to pay a judgment which was a lien upon the property of all the sureties, against both the co-sureties themselves and their grantees of the other property upon which the judgment was also a lien.⁷ One surety in a joint and several obligation in which there was a warrant to confess judgment, having paid the whole indebtedness, may enter judgment upon the obligation to his own use, and have execution against his co-surety for the latter's proportion.⁸ One of two co-sureties who has paid the full amount of a civil recognizance will be allowed to use

¹ *Chapman v. Jenkins*, 31 Barb. Eq. (So. Car.) 409; *Smith v. Rumsey*, 33 Mich. 183; *Hess's Estate*, 69 (N. Y.) 164.

² *Bobbitt v. Flowers*, 1 Swan Penn. St. 272; *Fleming v. Beaver*, 2 (Tenn.), 511. Rawle (Penn.), 128; *Howell v. Reams*, 73 Nor. Car. 391.

³ *Hess's Estate*, 69 Penn. St. 272; *Croft v. Moore*, 9 Watts (Penn.), 451; ⁶ *Moore v. Bray*, 10 Penn. St. 519.

Cuyler v. Ensworth, 6 Paige (N. Y.), 32; *Felton v. Bissel*, 25 Minn. 15. ⁷ *Furnold v. Missouri Bank*, 44 Mo. 336.

⁴ St. 19 & 20 Vic., c. 97, § 5.

⁵ *Burrows v. McWhann*, 1 Desaus. Co., 82 Penn. St. 80. ⁸ *Wright v. Grover & Baker S. M.*

the recognizance for the purpose of recovering out of the estate of his co-surety one half of the sum so paid by him.¹ If one surety has received property or security for or to be applied upon the debt, and another surety is then compelled to pay the whole debt, the latter can follow this property in equity and have the benefit of it,² or he may at law recover its value from the surety who has received it.³ But in Massachusetts it is said that where one of the co-sureties gives collateral security for the payment of the debt for which he is surety, his co-surety does not, by paying the debt, become entitled to the benefit of that security; the holder of collateral security has no right to transfer it after payment of the debt for which it was pledged; payment of the debt, by whomsoever made, discharges the security.⁴

§ 141. **Co-sureties entitled to the Benefit of Securities held by each other.**—A fund deposited by the principal debtor with one of his sureties as a security against the latter's liability will inure proportionally to the benefit of all the co-sureties.⁵ In the absence of special circumstances it is a general rule that one surety is entitled to share in the benefit of any indemnity which his co-surety may have taken from the principal debtor,⁶ even though such indemnity may have been intended by the principal for the benefit of the latter surety alone.⁷ Any security given to one surety and conditioned for the payment of the common indebtedness will inure to the benefit of

¹ *Swan's Estate*, Irish R. 4 Eq. Vt. 617; *Fishback v. Weaver*, 34 Ark. 209, overruling *Salkeld v. Abbott*, 569.

Hayes & Jones Irish Eq. 110, and *Onge v. Truelock*, 2 Molloy, 42.

² *Hinsdill v. Murray*, 6 Vt. 136.

³ *Parham v. Green*, 64 Nor. Car. 436.

⁴ *Bowditch v. Green*, 3 Met. (Mass.) 360.

⁵ *Smith v. Conrad*, 15 La. Ann. 579; *Hall v. Robinson*, 8 Ired. Law (Nor. Car.), 56; *Hayden v. Cornelius*, 12 Mo. 321; *Aldrich v. Hopgood*, 39

⁶ *Brown v. Ray*, 18 N. H. 102; *Comegys v. State Bank*, 6 Ind. 357; *Fagan v. Jacocks*, 4 Dev. Law (Nor. Car.), 263; *Gregory v. Murrell*, 2 Ired. Eq. (Nor. Car.) 233; *Bobbitt v. Flowers*, 1 Swan (Tenn.), 511; *McMahon v. Fawcett*, 2 Rand. (Va.) 514; *Elwood v. Deifendorff*, 5 Barb. (N. Y.) 398.

⁷ *Steel v. Dixon*, 17 Ch. Div. 825; *Hartwell v. Whitman*, 36 Ala. 712.

all the co-sureties.¹ Persons who are subject to a common burden stand to each other upon a common ground of interest and of right; and whatever relief by way of indemnity is furnished to one of them by him for whom the burden is assumed must be applied equally for the relief of all the common associates.² If one surety by any means gets possession of a fund belonging to the principal, he is not permitted to take the entire benefit of it, but must share it with his co-sureties.³ If one who is a surety for the same principal on various liabilities, on some of which he has co-sureties, takes from his principal security generally for his protection, this is, for the benefit of his co-sureties, to be apportioned among all the demands *pro rata*.⁴ But if one surety takes from his principal a mortgage for his protection against a particular debt, this will inure to the benefit of his co-sureties on that debt, and the mortgagee will have no right to apply the proceeds of the security to the payment of any other debt, to the prejudice of his co-surety.⁵ To prevent circuitry of action and attain the ends of natural justice, a court of equity will completely indemnify one of the sureties upon a bond by means of a lien upon the property of the principal existing in favor of another surety, notwithstanding the former surety has himself relinquished another lien upon the same property, originally created for his indemnification.⁶ A mortgage executed to one or more of the sureties upon the official bond of an officer will inure to the benefit of all the sureties, as well those who subsequently become such under an order of court made in pursuance of law requiring additional sureties upon the bond, as those who were sureties at the date of the mortgage.⁷ The same rule will be applied to

¹ Bell v. Lamkin, 1 Stew. & P. (Ala.) 460; Low v. Smart, 5 N. H. 353; Lane v. Stacey, 8 Allen (Mass.), 41.

² Miller v. Sawyer, 30 Vt. 412; Agnew v. Bell, 4 Watts (Penn.), 31.

³ Leary v. Cheshire, 3 Jones Eq. (Nor. Car.) 170; Whipple v. Briggs, 28 Vt. 65.

⁴ Brown v. Ray, 18 N. H. 102; Goodloe v. Clay, 6 B. Mon. (Ky.) 236.

⁵ Steele v. Mealing, 24 Ala. 285.

⁶ West v. Belches, 5 Munf. (Va.) 187.

⁷ Farmers' Bank v. Teeters, 31 Ohio St. 36.

property or securities deposited by one co-surety with another for their joint benefit as to securities furnished by the principal; each is entitled to his proportion, and only to his proportion thereof.¹

§ 142. **A Surety cannot have Contribution from his Co-sureties without accounting for such Security.** — A surety who, having received property or security from the principal, has paid the whole debt, cannot maintain an action against his co-sureties for contribution, without showing that this property or security has been properly disposed of, and has failed to satisfy the debt for which contribution is demanded.² If the security has not yet been disposed of, the remedy is in equity.³ But if the surety who has paid the debt has received only a partial indemnity from his principal, he may recover from his co-surety the latter's proportionate share of the balance.⁴ And if indemnity other than money has been provided by the principal for his sureties, but no satisfaction has been realized therefrom, this will not prevent the surety who has paid the debt from recovering contribution from his co-sureties.⁵ The principal debtor having mortgaged to one of his sureties as security against his suretyship land worth less than half of the debt, and then become insolvent, the unsecured surety gave to the mortgagee half the amount of the debt, and the mortgagee agreed to pay the debt, and to give to the other surety half of all that he might receive from the principal debtor; and it was held that this promise included whatever he might realize upon the mortgage previously given to him by the principal.⁶ But a mere indebtedness of the surety who seeks contribution to the principal is not available to the co-sureties;⁷ and where lands of the principal debtor are sold under an execution

¹ *Mitchell v. Bass*, 24 Tex. 392.

⁴ *Bachelder v. Fiske*, 17 Mass. 464.

² *Davis v. Toulmin*, 77 N. Y. 280;

⁵ *Anthony v. Percifull*, 8 Ark. (3

Morrison v. Poyntz, 7 Dana (Ky.), English), 494; *Johnson v. Vaughn*, 307; *Chilton v. Chapman*, 13 Mo. 65 Ills. 425.

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⁶ *Sheldon v. Welles*, 4 Pick.

³ *Morrison v. Poyntz*, 7 Dana (Mass.) 60.

(Ky.), 307.

⁷ *Davis v. Toulmin*, 77 N. Y. 280.

against him, and are purchased by one surety with money belonging to himself and a second co-surety, as this is not a fund coming from the principal, a third co-surety cannot maintain a claim to participate in the benefit of the purchase as indemnity against his liability with the other sureties.¹

§ 143. **A Surety holding Security regarded as a Trustee thereof for his Co-sureties.**—When one of two or more co-sureties obtains in any manner a security for the payment of the debt, he does this for the benefit of all the sureties; he is a trustee for his co-sureties as to such security,² and is held for them to the duties which arise from that relation,³ and must do no act, or voluntarily omit to do any act, by which such security will be depreciated or lost, but must faithfully apply it to the payment of the debt; or he will be chargeable to his co-sureties with the amount of the security, in the adjustment of their proportions of the debt.⁴ He must at his own peril use reasonable diligence to secure the appropriation of the property to the payment of the debt.⁵ All the co-sureties are liable among themselves for contribution to the extent of any balance that may remain due after the faithful application of the proceeds of the property to the payment of the debt.⁶ If one of several sureties takes from their principal a chattel mortgage or other security to indemnify him for becoming such surety, and afterwards discharges the same, it being of sufficient value to have paid the debt, he will by that act be prevented from calling on his co-sureties for contribution.⁷ But if the security discharged is of unascertained value, it has been said that the only remedy of the co-sureties is in equity; they

¹ Crompton v. Vasser, 19 Ala. 259.

² Hall v. Robinson, 8 Ired. Law (Nor. Car.), 56; Carpenter v. Kelly, 9 Ohio, 106.

³ Taylor v. Morrison, 26 Ala. 728; Ramsey v. Lewis, 30 Barb. (N. Y.) 403.

⁴ Schmidt v. Coulter, 6 Minn. 492; Roberts v. Sayer, 6 T. B. Mon. (Ky.)

188; Fielding v. Waterhouse, 8 Jones & Spencer (N. Y.), 424.

⁵ Goodloe v. Clay, 6 B. Mon. (Ky.) 236; Kerns v. Chambers, 3 Ired. Eq. (Nor. Car.) 576.

⁶ John v. Jones, 16 Ala. 454.

⁷ Taylor v. Morrison, 26 Ala. 728; Ramsey v. Lewis, 30 Barb. (N. Y.)

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will still be liable for contribution at law.¹ Where one co-surety, having received property as security from the principal debtor, caused the same to be sold for enough to pay the debt, but never collected the money, it was held that he could not, upon afterwards paying the debt, recover any contribution thereto from his co-surety;² nor if, having collected the money, he had then procured the original debt to be assigned to a third person for his benefit, would such assignee be allowed in equity to collect anything from the co-surety.³

§ 144. **His Rights and Liabilities towards his Co-sureties.**

—The surety who holds securities from his principal will be protected from loss if he manages them with prudence, good faith, and integrity; a mere change of the security, made in good faith, and not resulting in loss, will not discharge his co-sureties from liability for contribution.⁴ If his security is a chattel mortgage, he is not bound to take possession of the property until he has paid the debt, or has reason to apprehend that he will be called upon to pay it, and that the property will be squandered; then, if he fails to take the proper steps to preserve the security, he will be chargeable by his co-sureties with the fair market-value of the property which by the exercise of due diligence he might have secured.⁵ If he has taken a mortgage as security, with an agreement that it shall not be recorded, he cannot be charged by his co-sureties for failing to have it recorded.⁶ He is entitled, as against his co-sureties, to be allowed for his necessary and reasonable expenses incurred in protecting the security,⁷ but not for any expenses unnecessarily incurred without the consent of the co-sureties.⁸ Where one of two sureties received from the principal debtor the latter's note for one-half of the debt, payable on demand,

¹ *Paulin v. Kaighn*, 27 N. J. Law, 503; *Johnson v. Vaughn*, 65 Ills. 425; *Anthony v. Percifull*, 8 Ark. (3 English) 494. ⁵ *Teeter v. Pierce*, 11 B. Mon. (Ky.) 399.

² *Chilton v. Chapman*, 13 Mo. 470. ⁶ *White v. Carlton*, 52 Ind. 371.

³ *Silvey v. Dowell*, 53 Ills. 260. ⁷ *Comegys v. State Bank*, 6 Ind. 357.

⁴ *Carpenter v. Kelly*, 9 Ohio, 106. ⁸ *John v. Jones*, 16 Ala. 457; *Comegys v. State Bank*, 6 Ind. 357.

by which he might secure himself whenever he pleased, and afterwards received another note from the principal for goods sold to him, and then brought an action upon both notes, recovered judgment, and collected on the execution enough to pay the whole of the first note and part of the second, and then, the principal having become insolvent, the sureties paid each one-half of the debt for which they were bound, the second surety being ignorant that the first had received any indemnity from the principal, it was held, on a bill in equity brought by the second surety against the first, that the first surety must account to the second for one-half of the amount of the indemnifying note that he had thus received from the principal.¹ Where one surety agreed with the principal debtor, if the latter would consent to the sale of certain property mortgaged by him to the creditor for the payment of the debt, the creditor being unwilling to sell it without such consent, to buy it if it should sell for less than its value, and hold it as a common indemnity for the protection of himself and his co-sureties, it was decided, on the purchase being made in accordance with the agreement, that a trust immediately arose in favor of the co-sureties, which could be enforced at their instance; that the surety so purchasing would be responsible for the property with its proceeds and profits, and for all losses that could be prevented by the care and diligence which trustees are bound to exercise, and should be allowed the price which he paid for the property, unless that had been in some other way reimbursed to him.²

§ 145. **Surety may in Equity prevent Discharge of Security held by his Co-surety.** — If a security is taken for the indemnity of two co-sureties, one of them has no power to discharge it to the prejudice of the other.³ In a case in Massachusetts, it appeared that A sold goods to B, who mortgaged them to C, to secure him against liability upon a promissory note signed by B as principal and by C and D as sureties. The

¹ *Miller v. Sawyer*, 30 Vt. 412.

² *Steele v. Brown*, 18 Ala. 700

³ *Hayes v. Davis*, 18 N. H. 600.

mortgaged goods were attached and levied upon in a suit against A, as having been sold by him in fraud of his creditors. C then brought a suit against the attaching officer for a conversion of the goods, but afterwards agreed with the officer to discontinue the suit and discharge his mortgage, upon the officer's agreeing to pay part of the note and to collect the balance thereof from D. D thereupon brought a bill in equity against the officer and C, to restrain the discontinuance of the suit and the discharge of the mortgage, and for leave to prosecute the action in his own behalf; and it was held that he had a right to maintain the bill.¹

§ 146. **Security held by one who is both a Creditor and a Surety.** — If one who is both a creditor and a surety takes security for the debt due to himself, as well as to indemnify himself from his liability upon the demand for which he is surety, he is entitled to appropriate so much of it as is necessary for the payment of his own claim in full. But he cannot hold it against his co-sureties on account of demands against the debtor which he has obtained after the transfer of the security to him, unless there was an agreement when he took the security that he should obtain the other demands and hold the security for them also.² Though it is a settled principle in equity that if one of several sureties takes a security from the common principal for his own indemnity, this will inure to the benefit of all the sureties so far as they are co-sureties, yet, if he has a security for individual claims of his own against the same principal, he is entitled to hold this for his own benefit.³

§ 147. **Surety must contribute to Cost of Security of which he seeks the Benefit. Waiver.** — If one surety obtains indemnity from the principal, his co-surety cannot claim the benefit of that indemnity without paying his proportion of the considera-

¹ Sheehan v. Taft, 110 Mass. 331. second note was for an indebtedness incurred after the taking of the security.

² Brown v. Ray, 18 N. H. 102.

In Miller v. Sawyer, 30 Vt. 412, the ³ McCune v. Belt, 45 Mo. 174.

tion therefor; and if an offer of indemnity is made to the sureties by the principal, on the condition that they shall give him a release, which offer is accepted by the one and refused by the other, though the latter would have a right to demand that the proceeds of the securities thus obtained by the former should be applied in reduction of the common debt, yet these securities could in no other way inure to his benefit; and this payment would discharge the former surety from contribution to the latter, if it amounted to his proportion of the common debt.¹ The complainants and the defendant being bound as co-sureties for a debtor to whom the defendant was also indebted, the principal proposed to relieve the defendant from his liability as surety by giving a new note with other sureties, if the defendant would give him a sight draft for the amount of his indebtedness, or, if he failed to procure the defendant's release from his suretyship, that he would then place the defendant's notes in the hands of a third person, to protect the defendant alone upon his suretyship: to this arrangement the complainants assented, and this assent was held to be an express waiver of the right which they would otherwise have enjoyed to participate in the indemnity thus given to the defendant.² But the fact that the complainants objected to the principal's making an assignment for the benefit of his sureties, because this would injure his credit, and agreed that he might procure the release of the defendant from his suretyship, if the latter would pay him the amount of his indebtedness, and that the defendant then said in their hearing that if the principal failed to carry out the arrangement for his relief he should take measures to protect himself, are not sufficient to establish a waiver on the part of the complainants of their legal right to share in any indemnity or security which the defendant might afterwards obtain from the principal.³

§ 148. **Right of one Surety to stipulate, on becoming such, for a Separate Indemnity to himself.** — But if one surety on

¹ *White v. Banks*, 21 Ala. 705.

² *Tyus v. De Jarnette*, *supra*.

³ *Tyus v. De Jarnette*, 26 Ala. 280.

becoming such stipulates for and receives from his principal a separate indemnity, this is his exclusively; and his co-sureties can claim from him only the surplus of the proceeds thereof over what is necessary for his indemnification.¹ One surety has the right so to stipulate for a separate indemnity to himself, and to apply that indemnity upon his portion of the common liability; and such an indemnity can be reached by his co-sureties only when it was taken in fraud of their rights or for their common benefit.² And one surety is not entitled to the benefit of a mortgage which was given and is conditioned merely to indemnify his co-surety after the loss of the co-sureties had been adjusted by each of them paying one-half of the sum for which they were bound.³ Though it is a general rule that whatever payment one surety may receive from the principal shall inure to the benefit of all, yet, where payment of the debt for which all were liable has been made by one, and the claim against each for contribution has become fixed, each may on his separate account look to the principal for the reimbursement of his own share.⁴ And if one of two sureties has actually paid the whole debt for which both were liable, he may recover from the other surety half of the amount thereof, although, since such payment, he may have received from the principal the other half, expressly for his separate indemnity.⁵ The accommodation maker of a note cannot treat a mortgage given to the subsequent accommodation indorser thereof by the party for whose benefit the note was made, and conditioned to save the indorser harmless from his liability on the note, as a security taken by the indorser for the benefit of both of them, even though the indorser has since purchased the equity of redemption in the mortgaged property; he is liable to the indorser, on the latter's taking up the note, for the amount

¹ *Moore v. Moore*, 4 Hawks (Nor. Car.), 358.

² *Thompson v. Adams*, 1 Freem. (Miss.) 225.

³ *Hall v. Cushman*, 16 N. H. 462.

⁴ *Gould v. Fuller*, 18 Maine, 364.

⁵ *Gould v. Fuller*, *supra*; *Paulin v. Kaighu*, 27 N. J. Law, 503.

thereof, less only the actual value of the security.¹ If, however, two persons successively indorse a note for the accommodation of the maker thereof, and the second indorser, having been supplied by the maker with means to pay the note, promises the first indorser that these means shall be applied for that purpose, and thereby lulls the first indorser into inaction, which would result in his injury if held to pay the note, such promise creates an equity in favor of the latter which will support an action by him against the first indorser.²

§ 149. **A Co-surety called upon for Contribution becomes thereby entitled to Subrogation.**— If one surety calls upon his co-surety for contribution, he must at the same time permit the latter to be subrogated with himself to all the rights to which he has been subrogated by his payment.³ So one surety for the payment of a judgment, if he is held to contribute for the benefit of a co-surety who has paid the judgment, will thereupon be subrogated to the lien of the judgment upon the land of the judgment-debtor.⁴

§ 150. **Subsequent Sureties not entitled to Indemnity provided for Prior Sureties.**— Although the rights of co-sureties against each other are not affected by the fact that they became sureties at different times,⁵ by different instruments,⁶ or even without each other's knowledge,⁷ if only they are as among themselves co-sureties,⁸ yet sureties who bind themselves after the liability of the original sureties has become fixed are not entitled to share in the benefit of an indemnity

¹ *Post v. Tradesmen's Bank*, 28 Conn. 420.

² *Rice v. Truesdell*, 28 N. J. Eq. 200.

³ *Stanwood v. Clampitt*, 23 Miss. 372.

⁴ *Green v. Milbank*, 56 How. Pr. (N. Y.) 382

⁵ *Powell v. Powell*, 48 Calif. 235; *Mouson v. Drakeley*, 40 Conn. 552; *Bosley v. Taylor*, 5 Dana (Ky.), 157.

⁶ *Armitage v. Pullen*, 37 N. Y.

494; *Bell v. Jasper*, 2 Ired. Eq. (Nor. Car.) 597.

⁷ *Norton v. Coons*, 3 Denio (N. Y.), 130; *Chaffee v. Jones*, 19 Pick. (Mass.) 260; *Craythorne v. Swinburne*, 14 Ves. 160.

⁸ *Blake v. Cole*, 22 Pick (Mass.) 97; *Wells v. Miller*, 66 N. Y. 255; *McPherson v. Talbot*, 10 Gill & J. (Md.) 499; *Robertson v. Deatherage*, 82 Ills. 511; *Salysers v. Ross*, 15 Ind. 130.

provided for the original sureties.¹ The principal in a bond assigned a claim to a trustee for the indemnity of his sureties, in trust to collect the claim and apply its proceeds to the payment of the bond. Before the claim was collected, a suit was brought upon the bond; and the sureties contributed ratably to its payment. One of the sureties having obtained a decree against the principal for what he had paid, took the principal in execution, and obtained from him a bond with sureties, which was afterwards forfeited, and the liability of the new sureties fixed. The trustee afterwards collected the claim assigned to him; and the court of chancery allowed the new sureties, after paying the claim for which they were liable, to participate in the trust fund, by subrogation to the rights of the original surety whom they had satisfied. But the court of appeals held that this was erroneous; that the surety who had obtained the security of the new bond was bound to proceed thereon against the sureties therein, and could come upon the trust-fund only for any deficiency in his recovery from them; and that the sureties in the new bond could not resort to the trust-fund for their reimbursement except to the extent of any surplus that might remain after the full indemnification of the original sureties.² But the rights of the original sureties would not be lost by their afterwards becoming sureties for the payment of a judgment recovered for the original debt; if they were then compelled to pay the judgment, they would be subrogated as if they had been held on their original obligation, so far as their interposition had not resulted injuriously to their co-sureties.³

§ 151. Extent of the Right of Subrogation among Co-sureties.

Creditor's Interference with the Right. — The subrogation of a surety against his co-sureties is the equitable right of the surety himself, and is not affected by the relations existing

¹ *Antea*, § 131 *et seq.*; Harns- 382; Langford v. Perrin, 5 Leigh
berger v. Yancey, 33 Gratt. (Va.) (Va.), 552.
527.

³ Preston v. Preston, 4 Gratt.

² Givens v. Nelson, 10 Leigh (Va.), (Va.) 88.

between the principal debtor and the co-sureties against whom the right is sought to be exercised.¹ It will be carried only to the extent of recovering from them their reasonable proportions of what he has paid,² not exceeding, however, the amount of the obligation;³ for whenever two persons stand in such relation to a common burden that contribution between them will be compelled, whatever advantages are acquired by one in dealing with the common creditor will be made to inure equally to the benefit of all.⁴ A surety who has paid the principal obligation by a conveyance of real estate can recover contribution from his co-surety only upon the basis of the real value of the land,⁵ though the price at which it was taken by the creditor may be evidence of this value.⁶ One of the sureties of an administrator who has bought up at a discount legacies, for the payment of which the sureties were bound, will be allowed to charge his co-surety only with his proportion of the expense actually incurred therefor.⁷ A surety in a bail-bond, who has compromised his liability with the obligee thereof, and taken an assignment of a judgment recovered by the obligee in an action on the bond against the other surety, can recover, in an action upon that judgment against his co-surety, only half the amount thereof.⁸ The doctrine of contribution between co-sureties is not founded upon contract, but is the result of general equity.⁹ And any interference by the creditor with the sureties' right of subrogation against each

¹ *Himes v. Keller*, 3 Watts & Serg. Marsh. (Ky.) 555; *Edmunds v. (Penn.)* 401; *Broughton v. Robinson*, Sheaham, 47 Tex. 443; *Jordan v. 11 Ala.* 922. Adams, 7 Ark. (2 English) 348.

² See *Snowdon, ex parte, Snowdon, in re*, 17 Ch. Div. 44.

³ *Fusilier v. Babineau*, 14 La. Ann. 764; *Sinclair v. Redington*, 56 N. H. 146; *Edmunds v. Sheaham*, 47 Tex. 443; *Jordan v. Adams*, 7 Ark. (2 English) 348.

⁴ *Steel v. Dixon*, 17 Ch. Div. 825; *Owen v. McGehee*, 61 Ala. 440.

⁵ *Hickman v. McCurdy*, 7 J. J.

Marsh. (Ky.) 555; *Edmunds v. Sheaham*, 47 Tex. 443; *Jordan v. Adams*, 7 Ark. (2 English) 348.

⁶ *Jones v. Bradford*, 25 Ind. 305.

⁷ *Tarr v. Ravenscroft*, 12 Gratt. (Va.) 642.

⁸ *Kelly v. Page*, 7 Gray (Mass.), 213.

⁹ *Dering v. Winchelsea*, 1 Cox Ch. Cas. 318; *Dennis v. Gillespie*, 24 Miss. 581; *Brindle v. Page*, 21 Vt. 94; *Fletcher v. Grover*, 11 N. H.

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other will, to the extent of the injury received thereby, discharge the sureties who are so injured,¹ just as a similar interference with their right of subrogation against their principal would have discharged them.² The same principles of equity exist between co-sureties to be relieved to the extent of the share of each in the debt by the acts of the creditor as exist between them and their principal to be relieved of the whole debt by similar acts of the creditor with their principal;³ and when the creditor by his acts discharges one surety, or extinguishes a lien upon his property for the debt, he can hold the other surety only for a *pro rata* share of the debt.⁴ This doctrine is to be limited in the same manner, and the diversities of the decisions are the same, as is the case with the similar doctrine of the release of the sureties by the creditor's interference with their rights against their principal.⁵

§ 152. **One Surety holding Security from the Principal holds it for the Whole Debt.** — As one of several sureties who holds property or security from the principal debtor to secure him against his suretyship holds it *primâ facie* for the benefit of his co-sureties as well as of himself, so he holds it, and has a valid lien upon it, as against his principal for the whole debt.⁶

¹ *Stirling v. Forrester*, 3 Bligh, 575; *Hodgson v. Hodgson*, 2 Keen, 704; *Evans v. Bremridge*, 2 Kay & Johns. 174; *McKim v. Demmon*, 130 Mass. 404; *Greenfield Savings Bank v. Stowell*, 123 Mass. 196; *Howe v. Peabody*, 2 Gray (Mass.), 556; *Smith v. United States*, 2 Wallace, 219; *Shock v. Miller*, 10 Penn. St. 401; *Klingensmith v. Klingensmith*, 31 Penn. St. 460; *Ide v. Churchill*, 14 Ohio St. 372; *State v. Van Pelt*, 1 Smith (Ind.), 118; *Martin v. Taylor*, 8 Bush (Ky.), 384; *Mitchell v. Burton*, 2 Head (Tenn.), 613; *Jennison v. Governor*, 47 Ala. 390; *State v. Matson*, 44 Mo. 305; *Dodd v. Winn*, 27 Mo. 501; *Rice v. Morton*, 19 Mo. 263.

² *Antea*, § 119 *et seq.*

³ *Waggoner v. Walrath*, 24 Hun (N. Y.), 443.

⁴ *Ex parte Gifford*, 6 Vesey, 805; *Stirling v. Forrester*, 2 Bligh, 575; *Rice v. Morton*, 19 Mo. 263. And see *Smith v. State*, 46 Md. 617.

⁵ *Antea*, § 119 *et seq.* And see *Collins v. Prosser*, 1 Barn. & Cress. 682; *S. C.* 3 Dowl. & Ry. 112; *Thompson v. Lack*, 3 Man., Gr. & Sc. 540; *Chipman v. Todd*, 60 Maine, 282; *Frederick v. Moore*, 13 B. Mon. (Ky.) 470; *Hewitt v. Adams*, 1 Patton & Heath (Va.), 34; *Ide v. Churchill*, 14 Ohio St. 372.

⁶ *McWhorter v. Wright*, 5 Ga. 555; *Bellune v. Wallace*, 2 Rich. Law (So. Car.), 80; *Priugle v. Sizer*,

Accordingly, where the principal maker of a note which was also signed by three others as his sureties made a mortgage of personal property to one of his sureties conditioned to indemnify him against his liability for the debt, and, the principal debtor having gone into insolvency, the mortgaged property was taken and sold by his assignee, the mortgagee was allowed, in an action against this assignee, to recover the proceeds of the property sold to the extent of his legal liability upon the note, although he had paid no part of the amount due thereon, and his co-sureties were equally liable with himself for the payment thereof, and although the consideration named in the mortgage was only one-third of the amount of the note; and parol evidence was held to be inadmissible to show that in making the mortgage it was the principal debtor's intention to secure the mortgagee only to the extent of one-third of what was due upon the note, under the belief that this would be a full indemnity for his liability.¹

§ 153. **Co-sureties' Right of Subrogation subject to Legal Rights of Third Parties.**—The equitable right of one surety upon his payment of the debt to be subrogated to the benefit of securities or property of the principal in the hands of a co-surety must yield to rights which have accrued to others upon the strength of the apparent legal title to such property. Accordingly, where a deed of conveyance absolute in its terms was made to three persons, for the real purpose of securing them against their liability as sureties for a debt of the grantor, and they gave to him a written promise, not under seal, to reconvey the land to him upon his payment of the debt, and then two of the sureties were compelled to pay the debt, the grantor and one of the sureties having become insolvent, it was held that the levy of an execution by a creditor of the insolvent surety upon his undivided portion of the land was

² Rich. N. S. (So. Car.) 59; Tunnell v. Jefferson, 5 Harringt. (Del.) 206; 519.

Miller v. Howry, 3 Pen. & Watts (Penn.), 374.

¹ Barker v. Buel, 5 Cush. (Mass.)

valid, and vested in such creditor the title to that portion, unaffected by any equitable claims of the sureties who had paid the debt.¹

§ 154. **The Creditor may be substituted to the Benefit of Security for the Debt held by a Surety.**—A creditor has also an equitable right to be substituted to the benefit of any collateral security for the debt which the principal debtor has given to his surety;² and where property has been conveyed in trust for such a purpose, the creditor whose debt is protected by the conveyance, although he is no party to it, may maintain a bill in equity to have the property applied to the payment of his demand.³ The creditor will be entitled to the benefit of a mortgage assigned by the principal debtor to a trustee for the protection of his surety, with authority, on default being made in the payment of the debt, to collect the mortgage-notes and pay the debt out of the proceeds.⁴ And a trustee who holds property which has been assigned to him by the principal debtor to save his surety harmless, with authority, at the request of the surety on the latter's being threatened with loss by reason of his suretyship, to sell enough of the property to answer the ends of the trust, is not bound to wait until the surety shall have been actually damnified by having been compelled to pay the money, but should relieve the surety from responsibility whenever he has the funds in hand for that purpose.⁵ The creditor is in equity entitled to the benefit of collateral security for the payment of the debt taken by a surety from the principal debtor, although he did not originally rely upon the credit of such security, or even know

¹ *Jewett v. Baily*, 5 Greenl. (Me.) 87. *Dana* (Ky.), 27; *Kinsey v. McDearmon*, 5 Coldw. (Tenn.) 392; *Miller v. Lancaster*, 5 Coldw. (Tenn.) 514;

² *Maure v. Harrison*, 1 Eq. Cas. Ab. 97; *Owens v. Miller*, 29 Md. 144; *King v. Harman*, 6 La. 607.

Roberts v. Colvin, 3 Gratt. (Va.) 358; *Cullum v. Mobile Bank*, 23 Ala. 797.

Saffold v. Wade, 51 Ala. 214; *Troy v. Smith*, 33 Ala. 469; *Seibert v. True*, 8 Kans. 52. ⁵ *Daniel v. Joyner*, 3 Ired. Eq. (Nor. Car.) 513.

³ *United States Bank v. Stewart*, 4

of its existence.¹ The creditor and the surety have correlative rights; they are each entitled to the benefit of the securities held by the other for the payment of the debt.² The creditor may, if necessary, compel the surety to surrender to him any peculiar means which may have been intrusted by the principal debtor to the surety for the purpose of securing the payment of the debt, such as a mortgage on real or personal property, or any other collateral security held by the surety.³

§ 155. **Security held by a Surety regarded as a Trust for the Payment of the Debt.**—The security for the debt, in whose-soever hands it may be, is treated as a fund held in trust for the payment of the debt: if it is in the hands of the creditor, the surety, upon paying the debt, will be subrogated to it for his indemnity; ⁴ if it is in the hands of a surety, the creditor may resort to it to secure the payment of his demand.⁵ All demands received by the surety from the principal debtor for the purpose of discharging the debt, either by their transfer to the creditor or by the payment of their proceeds to the creditor, are held by the surety in trust for the creditor.⁶ Equity, regarding the security as a trust fund created for the payment of the debt, will compel the surety to apply it for that purpose,⁷ and a voluntary transfer of such a security by the surety to the creditor will be upheld as if it had been made under a decree of the court.⁸ The effect of a mortgage or other security given by the principal debtor to his surety, conditioned that the principal will himself pay the debt and hold the surety harmless therefrom, is to create a trust and an equitable lien

¹ *Higgins v. Wright*, 43 Barb. (N. Y.) 461; *Rice's Appeal*, 79 Penn. St. 168; *Kinsey v. McDearmon*, 5 Coldw. (Tenn.) 392; *Carpenter v. Bowen*, 42 Miss. 28.

² *Saylors v. Saylors*, 3 Heisk. (Tenn.) 525; *Osborn v. Noble*, 46 Miss. 449.

³ *Redfield, C. J.*, in *McCollum v. Hinckley*, 9 Vt. 143, 149.

⁴ *Antea*, § 86 *et seq.*

⁵ *New London Bank v. Lee*, 11 Conn. 112.

⁶ *Green v. Dodge*, 6 Ohio, 80.

⁷ *United States v. Sturges*, 1 Paine C. C. 525; *Paris v. Hulett*, 26 Vt. 308; *Vail v. Foster*, 4 N. Y. 312; *Ross v. Wilson*, 7 Sm. & M. (Miss.) 753.

⁸ *Paris v. Hulett*, 26 Vt. 308; *Carlisle v. Wilkins*, 51 Ala. 371.

for the creditor ; and the surety will hold the property subject to such trust, even though his own liability may have been defeated by his decease or by the operation of the Statute of Limitations,¹ or by indulgence given by the creditor to the principal debtor.² The surety cannot defeat this trust by a conveyance of the property, except it be to a *bond fide* purchaser for value without notice ;³ and the record of such a mortgage of real estate will be constructive notice of the trust, so that creditors of the surety, or purchasers from him, even after his foreclosure of the mortgage, cannot, by means of an attachment or conveyance of the property, take it discharged of the trust ;⁴ nor will it be defeated by the subsequent insolvency or bankruptcy of the principal and the surety, or either of them.⁵ The effect of such a mortgage is in equity to pledge the property to the surety for the payment of the mortgagor's debt ; and the pledge is not redeemed, nor the equitable lien discharged, until the debt is actually paid.⁶ The surety cannot himself discharge the trust or relieve the property from the burden to the prejudice of the creditor.⁷ He may obtain security for the creditor, but he cannot discharge it.⁸

§ 156. **Creditor's Right to Security held by a Surety who is also a Creditor of the Principal.** — It is held in Kentucky⁹ and in Mississippi¹⁰ that a mortgage given by a principal debtor to his sureties, both to protect them against the debt for which they are sureties and to secure a debt due to them from himself, will be applied to the payment of both debts *pro ratâ*.

¹ Crosby v. Crafts, 5 Hun (N. Y.), 327 ; Eastman v. Foster, 8 Met. (Mass.) 19.

² Helm v. Young, 9 B. Mon. (Ky.) 394. ⁶ Shaw, C. J., in Eastman v. Foster, *supra*.

³ Carpenter v. Bowen, 42 Miss. 28 ; Ross v. Wilson, 7 Sm. & M. (Miss.) 753 ; Seibert v. Thompson, 8 Kans. 65. ⁷ Osborn v. Noble, 46 Miss. 449.

⁴ Eastman v. Foster, 8 Met. (Mass.) 19 ; Vail v. Foster, 4 N. Y. 312. ⁸ Simson v. Brown, 6 Hun (N. Y.), 251.

⁵ Carlisle v. Wilkins, 51 Ala. 371 ; ⁹ Helm v. Young, 9 B. Mon. (Ky.) 394 ; Moore v. Moberly, 7 B. Mon. (Ky.) 299, 301. ¹⁰ Ross v. Wilson, 7 Sm. & M. (Miss.) 753.

But in New York the rule has been laid down that since the sureties are to be regarded as *quasi* trustees for the creditor in respect to such security, the sureties are bound to pay over the first proceeds thereof to the common creditor, instead of applying them upon their own demand or paying them to their own general creditors.¹ Neither the creditor nor the surety can destroy the rights of the other in such a security; the interest of each will be protected from injury by the acts of the other.² The right of the surety to apply the security to the payment of his own demand before meeting that upon which he is liable as surety has also been maintained.³ The claim of the principal creditor to the benefit of such a security must be seasonably asserted.⁴ Two persons, one as principal and one as surety, signed a promissory note in consideration of a loan of money to the former; and the principal at the same time gave to the surety a mortgage conditioned that the principal should pay the note to the promisee thereof and hold the surety harmless therefrom, and should also pay a debt due from himself to the mortgagee; but the payee of the note did not make his loan under the inducement of the mortgage; nor was the mortgage made for his benefit or at his request. The principal paid the interest on the loan for several years, but no part of the principal sum, or of the debt due from himself to the surety, and afterwards died intestate and insolvent, and his estate was never administered upon. The mortgagee was never called upon to pay, and never paid, either the interest or any part of the principal of the note; and his liability upon the note became barred by the Statute of Limitations. The mortgagee afterwards sold and conveyed his interest under the mortgage for a valuable consideration without any notice to the purchaser that the payee of the note claimed any interest therein

¹ Ten Eyck v. Holmes, 3 Sandf. Snow, 1 Cush. (Mass.) 510; *antea*, Ch. (N. Y.) 428. § 146.

² Edwards v. Helm, 4 Scam. (Ills.) 142. ⁴ First Congregational Society v. Snow, *supra*.

³ First Congregational Society v.

by way of trust or equitable lien or otherwise ; and subsequent dispositions of the mortgaged premises were made in like manner without notice or knowledge of any such claim. The payee of the note then brought a bill in equity against the mortgagee and the purchaser from him, praying that the mortgagee might be directed to turn over to him, as equitably entitled thereto, the proceeds of the sale to such purchaser, and that the purchaser might be decreed to hold the premises as a trustee for the plaintiff, subject to an equitable lien for the payment of his note, and to pay to the plaintiff the balance due from such purchaser to the mortgagee on his purchase ; and it was held that he was not entitled to such relief.¹

§ 157. **Creditor's Right to Security held by Surety measured by that of Surety.** — It is generally considered that while the creditor has the right to be substituted to the place of the surety in a case in which the creditor has given indemnity to the surety, yet the creditor's right must be measured by that of the surety ; and the surety's right, to which the creditor will be substituted, must be determined by the instrument which creates it.² When the surety was secured by a pledge of the rents of certain property, and afterwards became the holder of the legal title to the property, operating a merger of the pledge as between the principal and the surety, it was held that the creditor had no longer any right of substitution to the merged security.³ If the condition of the surety's indemnity was that the principal should pay the debt in case he should be by law required to pay it, and should thus save the surety harmless therefrom, and it appears that the principal was not legally liable upon the debt and that the surety has not been damnified, the creditor cannot be substituted to the benefit of the security.⁴ So, if the surety's rights were created by a

¹ *First Congregational Society v. Snow*, 1 Cush. (Mass.) 510.

³ *Rankin v. Wilsey*, 17 Iowa, 463.

² *Bush v. Stamps*, 26 Miss. 463 ;
Bibb v. Martin, 14 Sm. & M. (Miss.) 87.

⁴ *Bibb v. Martin*, 14 Sm. & M. (Miss.) 87.

trust-deed which provided that, upon the recovery of judgment against the surety and the principal's failure to satisfy the same, the trustee should sell the property, the creditor could not subject the trust property to the payment of his claim without first obtaining judgment against the surety.¹ If the liability of the surety is contingent, as is that of an accommodation indorser of a note, the creditor cannot be substituted to the benefit of a security held by the surety for his indemnity until the liability of the latter has become fixed; and if the surety has been discharged by the laches of the creditor, the latter's right of substitution is gone.² If the surety holds the property only by a conveyance which is fraudulent as against the general creditors of the principal debtor, the creditor's right can be no better than that of the surety, and will not prevail against the principal's general creditors.³

§ 158. **Security given merely to indemnify Sureties cannot be enforced after Sureties discharged.** — A mortgage given to sureties merely to protect them against their suretyship cannot be enforced after the creditor has discharged the sureties. And where a debtor gave to his sureties such a security to protect them against their suretyship upon a note, and they assigned the mortgage to the creditor for his security, taking from him a discharge of their liability, the mortgage was held to be thereby extinguished; for as it was given merely to protect the sureties from their liability, and as that protection had been obtained by their discharge, the condition of the mortgage was fulfilled.⁴ So where the surety, having received from the principal a promissory-note for his indemnity, handed this over to the creditor, and the creditor brought suit upon it against the principal, it was held that if the remedy against the surety upon the original debt was barred by the Statute of Limitations,

¹ *Bush v. Stumps*, 26 Miss. 463.

³ *Thrall v. Spencer*, 16 Conn.

² *Tilford v. James*, 7 B. Mon. (Ky.) 139.

336; *Hopewell v. Cumberland Bank*,
10 Leigh (Va.), 206; *Higgins v.*

⁴ *Sumner v. Bachelder*, 30 Maine,

35.
Wright, 43 Barb. (N. Y.) 461.

there was a failure of the consideration of the note, and the creditor could not recover. But if the surety had given this note to the principal in payment of his liability, then it would be no defence to the principal, when sued upon this substituted note, that the remedy upon the principal obligation had now become barred by the lapse of time.¹

§ 159. **When the Surety's Transfer of his Indemnity to the Creditor does not extinguish it.** — The transfer by a surety to the creditor of an indemnity received by the former from the principal will not always extinguish the security in equity, if the transfer is made in consideration of the release of the surety by the creditor. It will not render the security inoperative in Alabama.² A judgment given by a principal debtor to his surety as an indemnity against his suretyship is not unavailable before the surety is actually damnified; for the surety may use it to compel the payment of the debt by the principal; and upon the assignment of such a judgment by the surety to the creditor, the latter may, for the collection of his demand, collect it from the proceeds of the debtor's real estate upon which it was a lien.³ If the principal debtor gives to his surety a mortgage, conditioned to be void if the principal shall save his surety from any trouble or expense by reason of the debt for which he is surety, and the surety assigns this mortgage to the creditor in consideration of his release by the latter from any other liability than the use of his name in the collection of the original debt, this assignment will not operate an extinguishment of the security; and the creditor can hold the mortgaged premises until they are redeemed by the payment of the debt.⁴ When an agent has undertaken to obtain security from a debtor of his principal, but has so negligently conducted himself therein as to become himself liable for the loss to his principal, and thereupon procures from the debtor a mortgage

¹ *Russell v. La Roque*, 13 Ala. (Penn.), 95; *Phillips v. Thompson*, 2 Johns. Ch. (N. Y.) 418.

² *Carlisle v. Wilkins*, 51 Ala. 371.

⁴ *Hayden v. Smith*, 12 Met. (Mass.)

³ *Bank v. Douglass*, 4 Watts 511.

to himself for his protection against such liability, and subsequently, the debtor having become insolvent, assigns this mortgage to his principal, this assignment will not in equity extinguish the mortgage for the benefit of a subsequent mortgagee of the same premises, but the creditor will be allowed the full advantage thereof, to the extent of the agent's liability to him.¹

§ 160. **Surety's Indemnity not available to the Creditor unless Insolvency intervenes.** — If the contract upon which a surety holds a mortgage or other security from the principal debtor is for the personal benefit of the surety, in contradistinction to the idea of creating security for the debt or of providing means for its payment, the creditor can claim no greater rights or remedies in the security than the surety himself enjoys.² If the surety himself has not been damnified and the conditions of his mortgage or other contract of indemnity have not been broken, as the surety himself could have no remedy, so the creditor, claiming under him and in his stead, can derive no benefit from the security.³ Security given by the maker of a note to one who indorses it for his accommodation, to secure him against his liability on the indorsement, not being an accessory to the principal obligation, but simply a personal indemnity depending on the payment of the note by the indorser, the indorser could not enforce the security until he should actually have been held to make payment on his indorsement; and the holder of the note, claiming through the indorser and merely standing in his place, can accordingly have no benefit of the security.⁴ A mortgage given, not to secure the debt, but simply to indemnify the surety, does not in the first instance attach itself to the debt as an incident to it; but whatever equity arises in favor of the creditor in regard to the security arises afterwards, and comes into existence only upon the insolvency of the parties holden for the debt; and

¹ *Grant v. Ludlow*, 8 Ohio St. 1.

² *Antea*, § 157.

³ *Osborn v. Noble*, 46 Miss. 449.

⁴ *Homer v. New Haven Savings Bank*, 7 Conn. 478; *Bowman v. McElroy*, 15 La. Ann. 646.

until this equity arises the surety has a right in equity, as well as at law, to release such security.¹

§ 161. **Application of these Principles in Connecticut.** — A debtor mortgaged certain real estate to B, to secure the latter for accepting his bills to a large amount, the condition of the mortgage being that the debtor should pay all such acceptances at their maturity, and save B harmless therefrom. Afterwards, the debtor desiring to obtain a loan from the Quinipiac Bank, an arrangement was made by which B mortgaged to the bank all his interest in the premises mortgaged to him as security for such loan, and the bank made a loan to the debtor upon this security. Both the debtor and B were at this time solvent and in good credit; but they both soon afterwards became insolvent, the bank's loan being unpaid, and B's acceptances being still outstanding in the hands of parties to whom they had been negotiated. The holders of these acceptances then claimed that the mortgaged premises should be applied to their payment; but it was held that this mortgage was to be regarded as a personal security created for the indemnity of B, and not as a security for the payment of the bills; that while the parties were solvent no equities arose with regard to the security in favor of the holders of the bills, and until such equities arose B had a perfect right to surrender his security, or, with the concurrence of the debtor, to transfer it to the bank as a security for the loan made by the bank; and that the rights of the bank to the security were not affected by the equity which afterwards, upon the failure of the debtor and of B, arose in favor of the holders of the bills.²

§ 162. **The Creditor is entitled to the Benefit of the Surety's Indemnity when Insolvency intervenes.** — But the creditor will be entitled, upon the insolvency of the principal and the surety, to the benefit of security held by the surety from the principal

¹ Jones v. Quinipiac Bank, 29 Conn. 25; Thrall v. Spencer, 16 Conn. 139.

² Jones v. Quinipiac Bank, *supra*.

merely for his indemnity,¹ if he has not waived this right by proving his demand as an unsecured one against the estates of those who are liable to him thereon.² Where an assignment of property was made to secure an indorser against the payment of certain notes indorsed by him, and he sold the property and converted it into money, and then became insolvent, the notes being unpaid, and the maker being also insolvent, it was held that this money, having been kept separate from his other property, did not pass to his assignees in bankruptcy, but that equity would follow the fund, and apply it to the payment of the notes.³ Where the purchaser of land procured a third person to give his note to the vendor for the price thereof, and to secure the maker of the note gave him a bond and mortgage on the land purchased, and the maker of the note became insolvent before it fell due, the vendor of the land was held to be entitled to the benefit of the bond and mortgage.⁴ The same rule has been applied upon the insolvency of the principal and the death of the surety who held the indemnity,⁵ and also upon the bare insolvency of the principal.⁶ But to give this right of substitution to the creditor, the relation of debtor and creditor must still subsist, both between the creditor and the surety,⁷ and also between the creditor and the principal.⁸ And if the state of accounts between the principal and the surety is such that the surety has lost his lien, the creditor's equitable right of substitution thereto is also destroyed.⁹

¹ Foye, *in re*, 16 N. B. R. 572; Fickett, *in re*, 72 Maine, 266; Keyes v. Brush, 2 Paige (N. Y.), 311; King v. Harman, 6 La. 607.

² New Bedford Savings Institution v. Fairhaven Bank, 9 Allen (Mass.), 175; Foye, *in re*, 16 N. B. R. 572; Loder's Case, L. R. 6 Eq. 491.

³ Kip v. New York Bank, 10 Johns. (N. Y.) 63, 65.

⁴ Vail v. Foster, 4 N. Y. 312.

⁵ Moses v. Murgatroyd, 1 Johns. Ch. (N. Y.) 119.

⁶ Dick v. Truly, 1 Sm. & M. (Miss) Ch. 557; Tilford v. James, 7 B. Mon. (Ky.) 336.

⁷ Constant v. Matteson, 22 Ills. 546; Tilford v. James, 7 B. Mon. (Ky.) 336; Foye, *in re*, 16 N. B. R. 572.

⁸ Watson v. Rose, 51 Ala. 292.

⁹ Foye, *in re*, 16 N. B. R. 572.

§ 163. **Surety's Indemnity sometimes treated as a Trust for the Payment of the Debt.** — The broad doctrine has also been often asserted that equity will regard security given by a principal debtor to his surety, though merely for the surety's indemnity, as a trust created for the payment of the debt, and will see that it is applied for that purpose, by substituting, if necessary, the creditor to its benefit.¹ So it has been held that in chancery, if a creditor applies to be substituted to the rights of a surety, a fund pledged by the principal for the indemnity of the latter will be applied directly to the payment of the debt, if the surety is liable for its immediate payment, and could upon his payment resort at once to this fund for his indemnity.² On this principle an accommodation indorser for a firm, who has been held to payment upon his indorsement, will be subrogated for his protection to the benefit of bonds given by each partner to the other upon the dissolution of the firm, to protect each respectively from the debts that were assumed by the other.³ Where the creditor recovered judgment against both the principal and the surety, and, the other property of the principal being found insufficient to satisfy the judgment, the surety directed the sheriff to levy the execution upon property mortgaged by the principal to him for his indemnity, which was accordingly done, it was held that the sale of this property upon the execution was valid and absolute, and that it extinguished the lien of the surety's indemnifying mortgage.⁴

§ 164. **Surety not to be harmed by the Substitution of the Creditor to his Indemnity.** — But the surety is not to be harmed by the creditor's appropriation of his indemnity; it must be applied first as may be needed for his protection.⁵ The mort-

¹ *Burroughs v. United States*, 2 Paine C. C. 569; *Branch v. Macon R. R. Co.*, 2 Woods C. C. 385; *Thornton v. Exchange Bank*, 71 Mo. 222; *Breedlove v. Stump*, 3 Yerg. (Tenn.) 257.

² *Constant v. Matteson*, 22 Ills. 546; *Baltimore & Ohio R. R. Co. v. Trimble*, 51 Md. 99.

³ *Ingles v. Walker*, 37 Ga. 256.

⁴ *Exline v. Lowery*, 46 Iowa, 556.

⁵ *Eastman v. Foster*, 8 Met. (Mass.)

gatee of a tract of land, which is subsequently sold to a third party, may elect to be substituted to the rights of such third party in a mortgage upon other property which the latter has taken to indemnify himself against the lien of the first mortgage; but in doing so he vacates the lien of his own mortgage upon the land which has been sold to the third party.¹ Where a surety executed a mortgage upon his own land to secure the payment of his principal's notes, the mortgage expressly providing that the surety should not be subjected to any further loss or liability than that which was created by the charge upon his land, and the surety afterwards took security from his principal to indemnify himself against any loss that he might sustain by reason of the mortgage that he had thus given, it was held that the surety's liability was limited to his own property mortgaged, together with any surplus remaining in his hands out of the security received by him from the principal after fully indemnifying himself therefrom for any loss resulting to him from his mortgage of his own property; and that the holders of the notes could either subject the mortgaged lands to the payment of the notes, or abandon the mortgage and resort to the security received by the surety from the principal debtor, or hold the mortgaged lands and any surplus of the security that might remain after fully indemnifying the surety for his loss by their resort to his lands; but that they had no further rights against the surety, either directly or by substitution to his security.² A creditor of a firm consisting originally of two partners, one of whom is deceased, will be compelled to proceed against property in the hands of the surviving partner before resorting to property which has been deposited by the deceased partner with his surety to indemnify the latter against his suretyship upon both this and other obligations.³ Where a

19; *Van Orden v. Durham*, 35 Calif. 136; *Robertson v. Baker*, 11 Fla. 192; *Keyes v. Brush*, 2 Paige (N. Y.), 311.

¹ *Robertson v. Baker*, 11 Fla. 192.

² *Van Orden v. Durham*, 35 Calif.

136.

³ *Newson v. McLendon*, 6 Ga. 392.

surety upon several promissory notes takes a mortgage from the principal, conditioned that the principal shall pay the notes and so save the surety harmless therefrom, and so holds the mortgage in trust for the holders of the notes, and he remains personally liable on only one of the notes, and the principal debtor has gone into insolvency, the mortgaged property, if sufficient to pay all the notes, will be applied for that purpose, and any surplus will be distributed among the general creditors of the mortgagor; but if the mortgaged property is insufficient to pay all the notes, it will be first applied for the indemnification of the surety, by paying in full, if necessary, the note on which he remains liable, and the surplus will be applied to the payment of the other notes *pro rata*.¹

§ 165. **Creditor cannot be substituted to a Security not created against his Debt.**—A creditor of a mortgagee may, by substitution in equity, avail himself of the rights of the mortgagee under his mortgage when it was made to secure the debt which he is seeking to recover, and which is due to himself; yet he cannot do so unless the mortgage was made to secure that very debt;² and the fact that a mortgagee has joined with his mortgagor as the latter's surety in a bond given by him to a second mortgagee of the same premises, gives the second mortgagee no equitable interest in the lien of the prior mortgage; nor in such a case would the insolvency of both the mortgagor and the prior mortgagee entitle the junior mortgagee, in the absence of any fraud practised upon him, to be substituted to the rights of the prior mortgagee.³ Nor will the plaintiff in an action for the recovery of a debt be allowed to hold money which has been deposited by a third person with a deputy sheriff as security to the deputy that persons whom he has accepted as bail of the defendant will justify as such bail.⁴

¹ Eastman v. Foster, 8 Met. (Mass.) 19.

² Shackleford v. Stockton, 6 B. Mon. (Ky.) 390.

³ Brant v. Clark, 27 N. J. Eq. 234.

⁴ Commercial Warehouse Co. v. Graber, 45 N. Y. 393.

§ 166. **Cases in which a Creditor has sought to be substituted to Securities held by a Surety or by one under a Secondary Liability.** — The principal debtor and two sureties having joined in an obligation to the creditor, the principal gave to one of the sureties a mortgage to secure its payment and save the sureties from loss. Afterwards the mortgagor and the mortgagee joined in a conveyance of an interest in the mortgaged property to a stranger, who retained in his hands a portion of the purchase-money to meet the charges thereon. The holder of the original obligation then claimed that he was entitled to be paid out of the mortgaged property, by substitution to the benefit of the mortgage; and it was held that he had a right to be so paid; and that this equitable right of his was not affected by the fact of the mortgagee's having joined in the conveyance to the stranger, especially as the latter had not only had notice of the mortgage, and consequently of the rights of the creditor thereto, but also had actually retained in his hands a portion of the purchase-money for his protection therefrom.¹ A mortgage which recited that the mortgagee had indorsed certain notes for the accommodation of the mortgagor, upon the condition that the mortgage should be given to secure him from any loss that he might sustain in consequence of the non-payment of the notes by the maker thereof at their maturity, was conditioned to be void if the mortgagor should pay the notes or should repay the mortgagee upon his paying them, and provided that the proceeds of any sale of the mortgaged premises should be applied to the payment of all claims of the mortgagee under the mortgage, whether then or thereafter payable, was held to constitute not merely an indemnity to the indorser, but a security for the payment of the notes, so that any *bonâ fide* holder of the notes might maintain a bill to foreclose it, and his rights would not be affected by a release given by the mortgagee.² But it has been decided in New Jersey that a mortgage given by a

¹ Kunkel v. Fitzhugh, 22 Md. 567.

² Boyd v. Parker, 43 Md. 182.

guardian to the sureties upon his guardianship bond, reciting the bond and conditioned to be void if the guardian should comply with the condition of the bond by paying over all the money in his hands to his ward upon the latter's arrival at full age, creates no trust for the benefit of the minor, but the mortgagees are the absolute owners of the mortgage, having both the legal and the beneficial interest in it, and the full right to treat it as their own.¹

§ 167. **Creditor substituted to the Claim of his Debtor for Reimbursement upon the Party ultimately liable.**—A creditor may also be substituted to the claim of his debtor for reimbursement upon one who is under no immediate liability to the creditor, where the latter is the party upon whom the burden of the debt ought ultimately to fall.² Thus, where an insurance policy had been properly assigned by the insured as security for a loan of money made to him by the assignee, but after a loss had occurred, the insured having failed and the insurance company having another claim upon a bottomry bond against the insured and a surety upon this bond, the company, being indemnified by the surety, retained the amount of this claim out of the loss upon the assigned policy, instead of collecting it from the surety, the assignee of the policy was allowed in equity to be substituted to the claim of the company upon the surety, to the extent of the amount so retained by the company out of what was due to him upon the policy.³ So, also, the placing of notes in the hands of an attorney-at-law as collateral security, to collect them, and to apply the proceeds upon a judgment against the person depositing them, creates an equity in favor of the judgment-creditor which will be enforced upon his application, although the attorney's receipt for the notes has been transferred to a third person.⁴ Where a mortgagor, having paid the amount due upon the mortgage to the mortgagee after the latter had without the knowledge of

¹ *Miller v. Wack*, 1 N. J. Eq. 204.

² *Antea*, § 85.

³ *Wiggin v. Dorr*, 3 Sumner C.C. 410.

⁴ *Dunlap v. O'Bannon*, 5 B. Mon. (Ky.) 393.

the mortgagor assigned his mortgage, took from the mortgagee, after learning the facts, a bond conditioned that the mortgagee should pay to the assignee of the mortgage the amount that was due thereon and save the mortgagor harmless therefrom, it was held that the assignee of the mortgage was entitled to the benefit of this bond, and could enforce it against one who had guaranteed it to the mortgagor, although the latter had given an acknowledgment of satisfaction thereof to the mortgagee, the court saying that the mortgagor could obtain from the mortgagee (who had become the person ultimately liable in equity to pay the debt) security for the holder of the mortgage, but could not, as against the creditor, destroy that security when obtained.¹

§ 168. **Substitution to the Securities held by the Sureties in a Criminal Recognizance.**—The substitution of the creditor to the securities held by the sureties does not extend to the case of a recognizance taken in the course of criminal proceedings before the liability of the sureties has been fixed at law.² Thus, where the principal in such a recognizance gave a trust-deed to his sureties therein, providing that if the recognizance should be forfeited and the sureties become liable thereon, the trust property should be applied to pay the recognizance so far as it would go, it was held that the State could not maintain a bill in equity to subject this property to the payment of the amount due upon the recognizance before obtaining judgment against the sureties.²

¹ *Simson v. Brown*, 6 Hun (N. Y.), 251.

² *People v. Skidmore*, 17 Calif. 260.

CHAPTER IV.

SUBROGATION AMONG JOINT DEBTORS.

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§ 169. **Right of Joint Debtors to Subrogation as against each other.**—One of several joint debtors will, as against his co-debtors, ordinarily be subrogated to the securities and means of payment of the common creditor whom he has satisfied, so as to enable him to recover from his co-debtors, by means thereof, their proportional shares of the indebtedness which he has discharged.¹ Each joint debtor is regarded as the principal debtor for that part of the debt which he ought to pay, and as a surety for his co-debtors as to that part of the debt which ought to be discharged by them.² Thus, if three persons mortgage their joint property to indemnify the drawer of certain bills of exchange drawn for their accommodation,

¹ *Shropshire v. Creditors*, 15 La. Ann. 705; *Wheatley v. Calhoun*, 12 Leigh (Va.), 264. *Morrow v. Peyton*, 8 Leigh (Va.), 54; *Boyd v. Boyd*, 3 Gratt. (Va.) 113; *Moore v. State*, 49 Ind. 558; *Hall v.*

² *Henderson v. McDuffee*, 5 N. H. 38; *Newton v. Newton*, 53 N. H. 537; *Hatch v. Norris*, 36 Maine, 419; *Sterling v. Stewart*, 74 Penn. St. 445; *Hall*, 34 Ind. 314; *Collins v. Carlisle*, 7 B. Mon. (Ky.) 13; *Owen v. McGee*, 61 Ala. 440.

each of the mortgagors agreeing to take up a third part of the bills on their return, and then two of them neglect to take up their two-thirds, so that the other mortgagor is compelled to pay the whole of the bills, in consequence of which he requests the drawee not to release the mortgage, but to hold it for his benefit, an equitable lien is thereby created upon the mortgaged property to the amount of two-thirds of the bills in favor of that mortgagor who took up the bills.¹ Where one of several proprietors of land pays the whole cost of a pavement laid on the requirement of the municipal authorities, for which the property was bound and the proprietors were individually liable, he will be subrogated to the rights of the paver, to enable him to recover their proportions from the other proprietors.² Where two joint purchasers of real estate gave to their vendor a mortgage thereof to secure the payment of the purchase-money, and one of them died, leaving unpaid most of the purchase-money, which was thereupon paid by the survivor, it was held that the latter was entitled to be subrogated to the lien of the mortgage, and to hold the mortgaged property for the excess of the joint debt paid by him above his proportion thereof against the widow and heirs of the deceased purchaser.³

§ 170. **Where one Joint Debtor has assumed the Ultimate Liability.** — If, as between joint debtors, it has become the duty of one of them to pay the entire debt, the others, if they shall be compelled to pay it, will be subrogated to the securities and means of payment held by the creditor against the former, just as if they had been sureties of the former *eo nomine*.⁴ Thus, if two of the three principal obligors in a bond put into the hands of the third the means to pay it, but he fails to do so, and a judgment recovered upon the bond against the three is paid by

¹ Pratt v. Law, 9 Cranch, 456.

² Whitehead's Succession, 3 La. Ann. 396.

³ Wheatley v. Calhoun, 12 Leigh (Va.), 264.

⁴ Buchanan v. Clark, 10 Gratt. (Va.) 164; Butler v. Birkey, 13 Ohio St. 514; Field v. Hamilton, 45 Vt. 35; Cherry v. Monro, 2 Barb. Ch. (N. Y.) 618.

one of the two, the latter will be subrogated to the lien of the judgment upon the lands of the third in the hands of his grantees, to whom he has conveyed them since the judgment.¹ The same principle was applied in Vermont in a case in which it appeared that the plaintiff and M, being partners, agreed that M should pay the defendant for property which they had bought of him, and M accordingly sent his note to the defendant, who declined to receive it as payment, and demanded and received the price of the property from the plaintiff. The plaintiff and the defendant then agreed that the defendant should still hold M's note, and not let it be known that the plaintiff had paid for the property, and should turn over to the plaintiff anything that M might pay on the note. M having afterwards made a payment on the note to the defendant, in ignorance that the plaintiff had paid for the property, it was held that the plaintiff had by his payment become subrogated to all the securities and their avails that were in the control of the defendant, and that, M's note being such a security, the payment made thereon belonged to the plaintiff.² So if one of two joint debtors has given to their surety for the debt collateral security to protect him against his suretyship, and has then, by arrangement with his co-debtor for a valuable consideration, taken upon himself the burden of the whole debt, the other joint debtor, if he is afterwards compelled by the creditor to pay the whole debt, will be subrogated to the benefit of that security in the hands of the surety, whom he has discharged by his payment, in preference to the claims of the judgment-creditors of the debtor who should have paid the debt.³ The same rules will be applied if the joint debtors are a husband and wife who have been divorced.⁴

§ 171. **In Cases of Partnership.** — A partner who, after the dissolution of the partnership, pays a firm debt out of his private property may in equity enforce contribution therefor

¹ *Buchanan v. Clark*, 10 Gratt. Va. 164.

² *Field v. Hamilton*, 45 Vt. 35.

³ *Butler v. Birkey*, 13 Ohio St. 514.

⁴ *Stevens v. Goodenough*, 26 Vt. 676.

from his copartners,¹ but he cannot claim any lien upon the separate estate of his partner in bankruptcy for the balance due to himself upon settlement of the partnership accounts, by subrogation to the rights of a firm-creditor who has been paid out of the firm property;² for partnership creditors have themselves no lien upon the firm property,³ and can secure its application to their claims only through the rights of the partners.⁴ The creditors of a partner who is entitled to be subrogated as against the firm will succeed to his rights.⁵ The right of one partner who has paid a firm debt to be substituted to the position of the creditor as against his co-partners cannot ordinarily be enforced without a settlement of the partnership accounts.⁶ Nor can the bail of one partner, who have, as such bail, been compelled to pay a judgment recovered against that partner for a firm debt, recover at law from the other partners any part of the sum thus paid by them;⁷ and on the same principle, after suit brought upon a partnership debt and its satisfaction by one of the partners sued, equity cannot preserve or extend the validity of the original security under the guise of an assignment, so as to charge the bail of another partner for the former's reimbursement.⁸ But a partner who has gone out of the firm, and taken for a valuable consideration the agreement of the remaining members of the firm to indemnify him from the partnership debts, will in equity be regarded as the surety of the other partners,⁹ and will, if he is compelled to pay a firm debt, be subrogated to the rights and remedies of the creditor therefor against the

¹ *Downer v. Jackson*, 33 Ills. 464; *Eakin v. Knox*, 6 So. Car. (Rich.) 14.

² *In re Smith*, 16 N. B. R. 113.

³ *Case v. Beauregard*, 1 Woods C. C. 127; S. C. 99 U. S. 119.

⁴ *Hawk Eye Woollen Mills v. Conklin*, 26 Iowa, 422; *Waterman v. Hunt*, 2 R. I. 298.

⁵ *Royalton Bank v. Cushing*, 53 Vt. 321.

⁶ *Fessler v. Hickernell*, 82 Penn. St. 150; *Baily v. Brownfield*, 20 Penn. St. 41.

⁷ *Bowman v. Blodgett*, 2 Met. (Mass.) 308; *Osborn v. Cunningham*, 4 Dev. & Bat. Law (Nor. Car.), 423.

⁸ *Hinton v. Odenheimer*, 4 Jones Eq. (Nor. Car.) 406.

⁹ *Olson v. Morrison*, 29 Mich. 395; *Burnside v. Fetzner*, 63 Mo. 107.

remaining members of the firm.¹ And the representatives of a deceased partner who have paid the whole of a partnership debt may be substituted to the place of the creditor, in order to recover a contribution from the surviving partner or his estate.² If one partner buys the interest of the other in the firm property, and assumes the firm debts, he will in equity be regarded as the principal debtor, and the other as merely his surety; and a firm creditor who has notice of the facts is bound at his peril to treat the former partners respectively as principal and surety.³

§ 172. **Where Securities belonging to Different Owners are held for the Same Debt.** — Where securities belonging to several different persons are held together to secure the payment of a single debt, the creditor should proceed *pari passu* in applying them to the satisfaction of his claim, so that each of the several owners of the securities may contribute his just proportion of the common burden; and if such creditor, without notice of the claims of these owners, sells the securities belonging to one, and thereby satisfies the demand for which he holds all the securities, leaving the other securities undisturbed, equity will so dispose of the remaining securities that the burden of the debt shall be borne by all in reasonable proportions.⁴ The one whose property has paid the whole debt will be subrogated to the rights of the creditor against the others, and may hold their securities to enforce the payment by them of such sums as they ought in equity to contribute.⁵ If the security is a mortgage, and the whole debt is paid, to

¹ Scott's Appeal, 88 Penn. St. 173; Frow's Estate, 73 Penn. St. 459; Merrill v. Green, 55 N. Y. 270; N. Y. 204; Millerd v. Thorn, 56 N. Y. 402; Savage v. Putnam, 32 N. Y. 501; Smith v. Shelden, 35 Mich. 42; Conwell v. McCowan, 81 Ills. 285; Burnside v. Fetzner, 63 Mo. 107.

² Sells v. Hubbell, 2 Johns. Ch. (N. Y.) 394. *Contra*, in Alabama, Bartlett v. McRae, 4 Ala. 688; Hogan v. Reynolds, 21 Ala. 56.

³ Oakeley v. Pasheller, 10 Bligh, N. S. 548; Colgrove v. Tallman, 67 N. Y. 95; Morss v. Gleason, 64

⁴ Gould v. Central Trust Co., 6 Abbott New Cas. (N. Y.) 381; McCready v. Van Antwerp, 24 Hun (N. Y.), 322.

⁵ Aiken v. Gale, 37 N. H. 501.

save the estate of the party paying it, by one of two tenants in common who have, since the giving of the mortgage, acquired the equity of redemption, the assignment of the mortgage to this co-tenant will not extinguish its claim in favor of the other, who has paid nothing.¹ That share of the mortgage-debt which it belonged to such an assignee to pay is extinguished; his title to his portion of the mortgaged property is perfected; and he is subrogated to the rights of the mortgagee as to the other share, and may call upon his co-tenant to pay him the proportion of that share, or be foreclosed of his right to redeem.² As between the purchasers in common of an estate bound by a joint lien, each share is obliged to contribute only its proportion of the common burden, and beyond the amount of this proportion is to be regarded as the surety of the others; and if the owner of one share is called upon to pay more than its due proportion of the debt, such owner or his creditors will be entitled to stand in the place of the satisfied creditor to the extent of the excess which ought to have been paid out of the other shares.³

§ 173. **Where Land of two or more Owners is subject to one Mortgage.** — Where one of the owners of land which is subject to a mortgage pays off the mortgage-debt by instalments, and upon making the last payment takes an assignment of the mortgage, its lien is not thereby extinguished in favor of his co-tenant or of those who claim under his co-tenant.⁴ Either one of such owners, whether they hold distinct parcels of the incumbered estate, or are tenants in common of the whole, is at liberty to redeem for the protection of his estate; and upon so redeeming he becomes subrogated to the rights of the mortgagee, and is entitled to hold the land as if the mortgage subsisted, until the other owners reimburse him their proportions of the incumbrance; and in the absence of any

¹ *Barker v. Flood*, 103 Mass. 474.

³ *Gearhart v. Jordan*, 11 Penn. St.

² *Young v. Williams*, 17 Conn. 393; 325.

Cornell v. Prescott, 2 Barb. (N. Y.) 16.

⁴ *Duncan v. Drury*, 9 Penn. St. 322.

agreement their proportions will be determined by the proportionate value of their respective interests.¹ The grantee of such an owner will have the same right of subrogation as was possessed by his grantor.² Where two joint purchasers of land gave their joint notes for the purchase-money thereof, secured by a mortgage of the premises, and after they had made a partition of the premises one of them refused to pay his proportion of the last note, so that the land of the other was sold upon foreclosure and he was compelled to redeem the same, he was allowed to hold the land of the defaulter for the amount which he had thus been compelled to pay above his own share of the note;³ and he is entitled to the same interest as had been agreed to be paid upon the original debt.⁴ Upon the same principle, the assignee of a mortgage which covered three estates, having purchased two of these estates, can recover from the third estate only its ratable proportion of the mortgage-debt.⁵

§ 174. **This Principle applied against one claiming under a Joint Purchaser.**—One Pierson and four others purchased jointly a lot of land, took a conveyance thereof, and gave for the purchase-money their joint notes secured by a mortgage upon the lot. They then divided the lot among themselves into four equal parts, one of which was allotted to Pierson, and agreed to give each other quitclaim deeds of their respective parts. Pierson took possession of his part, built a house upon it, and then sold it to one Williams, who paid him therefor in full. The legal title still remaining in all the purchasers, they joined in conveying to him the parcel purchased by him of Pierson. Pierson paid nothing of the original purchase-money, of which he should have paid one-fourth; the remaining three-fourths were paid by the other purchasers. The mortgagee

¹ *Hubbard v. Ascutney Mill Dam Co.*, 20 Vt. 402; *Sawyer v. Lyon*, 10 Johns. (N. Y.) 32; *Aiken v. Gale*, 37 N. H. 501.

² *Watson's Appeal*, 90 Penn. St. 426.

³ *Fisher v. Dillon*, 62 Ills. 379.

⁴ *Simpson v. Gardiner*, 97 Ills. 237.

⁵ *Colton v. Colton*, 3 Phila. 24.

then filed a bill to foreclose his mortgage for the unpaid fourth part of the purchase-money; and it was decreed that the part of the lot set off to Pierson and conveyed to Williams should be first sold, *Judge Davison* saying, "The several owners of the residue of the lot having each paid one-fourth of the purchase-money, the remaining fourth was in equity the debt of Pierson; and as his debt it was properly chargeable on the property set off to him."¹ It was not pretended in this case that Williams had notice that Pierson had not paid his share of the purchase-money; but the decision was based upon the principle that, having notice of the mortgage, he was to be regarded as purchasing subject to the equities that arose under it. But under somewhat similar circumstances in Georgia it was held that one purchaser who had been compelled to pay the whole of the purchase-money had no equitable right to be subrogated for his reimbursement to the mortgage-lien upon the share of the other purchaser in the hands of a grantee from such other purchaser, although such grantee had constructive notice of the mortgage from the fact of its being recorded.²

§ 175. **Applied to Mortgagees whose Estate was subject to a Prior Lien.** — Where there were three junior mortgagees of land, having no priority among themselves, and it had been agreed between them and the mortgagor, that if it should be necessary to redeem from the prior mortgage it should be done by each of these three junior mortgagees paying one-third of the amount due thereon, and that they should be indemnified therefor out of the property mortgaged to them, and one of the three paid one-third of the amount due upon the prior mortgage, and then advanced the remaining amount and took an assignment of that mortgage, it was held that as to the remaining two-thirds he became subrogated to the rights of the prior mortgagee, and was entitled to require his co-mortgagees to redeem by paying to him those two-thirds, or forfeit all title to the mortgaged premises, and that the particular manner

¹ *Williams v. Perry*, 20 Ind. 437.

² *Clark v. Warren*, 55 Ga. 575.

in which they were to be indemnified out of the mortgaged property under the contract was a matter to be subsequently adjusted between them and the mortgagor.¹

§ 176. **Not applied where Lien upon one Security extinguished.**— If two securities are held for the payment of a debt, and the lien upon one of them has been lost by lapse of time, the owner of the other security, upon paying the debt, will acquire no right of subrogation to that which has been thus discharged.² A testator devised a tract of land to his two sons, Benjamin and Thomas, designating the share of each. A large amount of the purchase-money for this land being unpaid, the testator's vendor brought his bill against the executors, and obtained a decree charging the land with its payment. By a subsequent decree, the land was ordered to be sold therefor. These decrees remained unexecuted for several years. In the mean time Benjamin sold his portion of the land; and the purchaser thereof took and held possession until, by the operation of the Statute of Limitations, he acquired a title which was valid against these decrees. Then these decrees were revived; and by order of the court the remaining portion of the land, being the share of Thomas, was sold for the payment of the testator's indebtedness for the price of the whole tract. On a bill brought by Thomas against Benjamin for contribution it was held that, as the vendor's lien upon the whole tract had been lost and ended by the Statute of Limitations, so that the complainant could not have been subrogated to that lien, his payment of the debt conferred no benefit upon Benjamin, and consequently that Benjamin was not bound to contribute for his relief.³ Nor can one joint debtor be subrogated to the benefit of a security which has been otherwise lost as against the other. Where two purchasers of land gave back a mortgage for the price thereof, which, however, was not recorded, and the interest of one of them was subsequently

¹ *Hubbard v. Ascutney Mill Dam Co.*, 20 Vt. 402.

² *Screven v. Joyner*, 1 Hill Eq. (So. Car.) 252.

³ See *antea*, § 110.

conveyed to a *bonâ fide* purchaser for value who had no notice of the unrecorded mortgage, it was held that the mortgagee might yet enforce his mortgage for the whole amount remaining due thereon against the interest of the other debtor, who must then look to his co-debtor personally for the payment of the latter's share.¹

§ 177. **Where the Ultimate Liability is upon one of Several Owners of Securities held for the Same Debt.** — If the property of two owners is subject to a mortgage, and as between themselves it is the duty of one of them to discharge it, and the other pays the debt on an agreement that the mortgage shall inure to his benefit, or if he takes an assignment of the mortgage, an equity arises in his favor entitling him to obtain his reimbursement through the lien of the mortgage.² The relation between the debtors or the owners of the incumbered property in such a case is that of principal and surety;³ the primary and ultimate liability is upon him whose duty it is to pay the debt and upon his property; his payment of the debt will discharge it in favor of his co-debtor;⁴ and the grantee of his property incumbered with the debt, who has actual or constructive notice of the incumbrance and of the respective rights of the parties, will be in no better position than his grantor;⁵ he must pay the whole debt, even though his co-debtor should convey the other incumbered property to the common creditor.⁶ And in such a case a court of equity may order the properties or interests which the creditor holds for the security of his debt to be sold in the succession or in the proportion in which they are, among themselves, liable for its payment;⁷ thus, where

¹ Ohio Ins. Co. v. Ledyard, 8 Ala. (N. Y.) 618; Crafts v. Crafts, 13 Gray (Mass.), 360; Cook v. Hinsdale,

² Laylin v. Know, 41 Mich. 40; ⁴ Cush. (Mass.) 134.
Cornell v. Prescott, 2 Barb. (N. Y.) 16.

³ Cherry v. Monroe, 2 Barb. Ch. 360.
(N. Y.) 618; *antea*, Ch. III.

⁴ Cook v. Hinsdale, 4 Cush. (Mass.) (N. Y.) 16; Williams v. Perry, 20 Ind. 437.

⁵ Cherry v. Monroe, 2 Barb. Ch.

the joint purchasers of land, having given back a mortgage for its price, made partition of it among themselves, and one of them paid a part of the mortgage debt, it was held, on his offering to pay the residue of his proportion, that the court might properly order the share of the other purchaser to be first sold on a foreclosure of the mortgage.¹ And although, where a bill to redeem from a mortgage is filed by several persons as owners in different proportions of the equity of redemption, the proceedings of the mortgagee to enforce his security will not be delayed until the complainants have settled the proportions in which they are respectively to contribute to the redemption, yet, if they pay into court the full amount which is due to the mortgagee, the suit may be delayed for a reasonable time to enable them to proceed against another defendant, who is also interested in the equity of redemption, for the purpose of compelling him to contribute his ratable proportion of the mortgage-debt.²

§ 178. **These Principles applied to Joint Mortgagors and to the Grantees of a Mortgagor.** — C and S purchased a lot of land, and gave their joint note and mortgage for the price thereof. C afterwards conveyed his undivided half to S, subject to the mortgage, which S assumed and agreed to pay, and gave to C a bond of indemnity against the same. S subsequently conveyed the lot to a grantee with full covenants of warranty and against incumbrances, and then became insolvent and left the State, having failed to pay the mortgage-debt. The mortgagee being about to foreclose, the grantee of S persuaded him to bring a suit against C on the note, instead of proceeding against the land; and C thereupon tendered to the mortgagee the full amount due to him, and demanded an assignment of the note and mortgage to a third person for his benefit, so that he might enforce them against the land for his indemnity; but the mortgagee refused to make such an assignment. It was

¹ Roddy's Appeal, 72 Penn. St. 98.

² Brinckerhoff v. Lansing, 4 Johns. Ch. (N. Y.) 65.

held, on a bill in equity then brought by C against the mortgagee and the grantee of S, that the arrangement between C and S and the conveyance from the former to the latter constituted in equity the relation of principal and surety, not only between themselves personally, but also with reference to their interests in the mortgaged property; that the equitable rights of C and S were now the same as if S had originally owned the whole lot, and had given the mortgage for his own debt, and C had been merely his surety; that in such a case, as between the owner of the equity of redemption and the surety, the land would be the primary fund for the payment of the debt, and, if the surety should be compelled by the mortgagee to pay the debt, he would be entitled to be subrogated to the charge of the mortgage upon the land; and that C's rights were not affected by the fact that he had taken a bond of indemnity from S, for, as S was insolvent, his sureties on that bond might well insist that the land should be first resorted to for the payment of the mortgage-debt, instead of its being collected from C, and their liability to him upon the bond thus becoming fixed.¹ The owner of land mortgaged it, and subsequently sold a part of it to a purchaser who assumed the mortgage, but failed to pay it, and conveyed the land he had purchased to B, who had notice of the facts. In the mean time, the mortgagor had conveyed another portion of the mortgaged premises to C, who conveyed it with warranty to another purchaser; and, the mortgage being still unpaid, this last purchaser, to relieve his estate, applied to its discharge a portion of the purchase-money which he would otherwise have paid to C. B being still indebted to his vendor for the price of his land in a sum greater than had been paid for the discharge of the mortgage, it was held that C, having in effect, through the payment made by his grantee, redeemed from the mortgage, was entitled for his reimbursement to be subrogated to its lien upon the land of B, which should have discharged it.²

¹ *Cherry v. Monroe*, 2 Barb. Ch. (N. Y.) 618.

² *Reardin v. Walpole*, 38 Ind. 146.

§ 179. **Extent of the Right of Subrogation.** — This right of subrogation is paramount to any other claim or lien upon the property against which it is sought to be exercised, if such other claim or lien was subject to the obligation which has been discharged by one debtor, or to the satisfaction of which his property has contributed more than its equitable share;¹ but it cannot take place beyond the amount actually paid by or from the property of the one who seeks to enforce it, nor beyond the proportional share of those who are, either personally or by a pledge or mortgage of their property, jointly liable with him.² He cannot be subrogated upon the payment of anything less than his proportion of the debt, although the others have paid nothing.³ If one of several obligors in a bond, each one of whom is bound for himself alone, overpays the amount due from himself, this overpayment, being made only upon his own liability, gives him no right of subrogation against the others, and does not inure to the benefit of either of the others.⁴

§ 180. **Whether Original Obligation discharged as to all the Debtors upon Payment by one.** — It was at one time held in Pennsylvania that, although a surety who has paid the bond debt of his principal will be placed in the situation of the creditor and entitled to all his rights and remedies against the principal, this rule will not be applied to a payment made by a joint debtor in a bond who is not a surety; but his claim against his co-obligors will be treated as merely a simple-contract claim for contribution;⁵ but this distinction has not since been followed in that State.⁶ The rule in England is now the same in this respect as to both sureties and joint

¹ *Silk v. Eyre*, Irish Rep. 9 Eq. 393; *Duncan v. Drury*, 9 Penn. St. 332.

² *Shropshire v. Creditors*, 15 La. Ann. 705.

³ *Sawyer v. Lyon*, 10 Johns. (N. Y.) 32.

⁴ *Pettengill v. Pettengill*, 64 Maine, 350.

⁵ *Greiner's Estate*, 2 Watts (Penn.), 414.

⁶ *Sterling v. Stewart*, 74 Penn. St. 445; *Gearhart v. Jordan*, 11 Penn. St. 325; *Duncan v. Drury*, 9 Penn. St. 332.

debtors ;¹ and in this country the same principles are generally applied between joint debtors or other persons who are, either personally or by a charge upon their property, liable for the same debt, as between principal and surety.² If the principal obligation is held to be extinguished upon its payment by one of the debtors, it cannot be kept alive by being assigned to a stranger who has paid it with money furnished to him for that purpose by one of the debtors.³ But if the assignment was made to the stranger by contemporaneous agreement to secure him for advancing money to take up the indebtedness, though at the request of one who is liable for the debt, such an assignment will not extinguish the original obligation.⁴

¹ Mercantile Law Amendment Act, Law, 180; *Hollingsworth v. Pearson*, 19 & 20 Vic., c. 97, § 5. 53 Iowa, 53.

² *Antea*, §§ 136 *et seq.* See also ³ *Hogan v. Reynolds*, 21 Ala. 56.
Neilson v. Fry, 16 Ohio St. 552; ⁴ *McIntyre v. Miller*, 13 M. & W.
Newsom v. McLendon, 6 Ga. 392; 725.
Hendrickson v. Hutchinson, 29 N. J.

CHAPTER V.

SUBROGATION AMONG PARTIES TO BILLS AND NOTES.

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§ 181. **An Indorser upon Payment subrogated to Rights of Holder against Prior Parties.**—The payment of a note or bill by an indorser to the holder thereof will not extinguish the instrument; but the indorser, after his payment, whether made voluntarily or upon compulsion, if he was liable for it,

will be subrogated to all the remedies that are available upon the note or bill against the antecedent parties thereto.¹ A partial payment by an indorser will not extinguish *pro tanto* the liability of antecedent parties, unless it was made in their behalf and not by reason of the liability of the party making the payment to the holder ;² the holder of the note can still collect the full amount thereof from the parties who are antecedently liable thereon, and will then receive the amount of such partial payment as a trustee for the indorser who originally made it, unless the ultimate liability to pay the note rests upon this indorser as between himself and the other parties to the note, in which case the payment made by him will accrue to their benefit.³ So the holder of a note, after receiving payment thereof from the indorser, may maintain an action thereon at the request and for the benefit of the indorser against the maker ; and the latter cannot set up the payment made by the indorser as a defence to the action against himself.⁴ The indorser of a promissory note, after its maturity and after his liability upon it has become fixed, does not cease to be entitled to the rights of a surety and become a joint principal debtor by joining with the maker of the note in a bond giving further time for its payment, although the bond does not describe him as a surety.⁵

§ 182. **The Maker of a Note not entitled to the Benefit of Payments made by Indorsers thereon.**—The maker of a note, in the absence of evidence to the contrary, is to be deemed the party ultimately liable thereon, and is not entitled, in an action on the note against himself, to a deduction for a

¹ Story on Prom. Notes, § 400 ; North National Bank v. Hamlin, 125 Woodward v. Pell, L. R. 4 Q. B. 55 ; Mass. 506.

Crawford v. Logan, 97 Ills. 396. See ² Cook v. Lister, 13 C. B. N. S. 543.

also Pollard v. Ogden, 2 El. & Bl. 459 ; Pacific Bank v. Mitchell, 9 Met. (Mass.) 297 ; Dougherty v. Deeny, 45 Iowa, 443. ⁴ Williams v. James, 15 Q. B. 498 ; Bank of America v. Senior, 11 R. I. 376.

² Randall v. Moon, 12 C. B. 261 ; ⁵ Merriken v. Godwin, 2 Del. Ch. Jones v. Broadhurst, 9 C. B. 173 ; 236.

partial payment not made by him or in his behalf, but by an indorser, and so in law not inuring to his benefit.¹ An indorser, upon taking up a bill which he has indorsed, is entitled like a surety to receive securities which the holder has received from prior parties to the bill, the debts secured by such securities being first fully paid to the holder.² The holder of a note is entitled to prove it in full against the bankrupt estate of the maker, although he has since the bankruptcy received a partial payment thereon from an indorser on the note.³ "The general rule undoubtedly is," said *Lowell, J.*, "that the holder of a note may prove against all parties for the full amount, and receive dividends from all until he has obtained the whole of his debt with interest. It is likewise the general rule, that what he has received from one party, or from dividends in bankruptcy of one party to the note, are payments which he must give credit for if he afterwards proves against others."⁴ I am of opinion that this latter rule must be confined to cases in which the payment has been made by the person primarily liable on the note or bill. . . . The better opinion at common law is that payment by a drawer or indorser does not exonerate the acceptor or maker, unless the promise of the latter was for the accommodation of the former, or there is some other equity which makes the note or bill the debt of the party who has made the payment, or unless he has made it at the request or for the benefit of the acceptor or maker.⁵ If this be not the rule at law, still I consider it to be so in bankruptcy. . . . A creditor may prove the debt, notwithstanding payment in whole or in part by a surety, because he in fact proves as trustee for the surety."⁶ "On the other hand, a

¹ *Lord, J.*, in *North National Bank v. Hamlin*, 125 Mass. 506.

² *Duncan v. North & South Wales Bank*, 6 App. Cas. 1.

³ *Souther, in re, Talcott, ex parte*, 2 Lowell, 320.

⁴ *Sohier v. Loring*, 6 Cush. (Mass.) 537; *Wildman, ex parte*, 1 Atk. 109;

Royal Bank, ex parte, 2 Rose, 197; *Taylor, ex parte*, 1 De G. & J. 305.

⁵ *Byles on Bills* (10th ed.), 221, and cases there cited.

⁶ *Souther, in re, Talcott, ex parte, supra*. Professor Ames (1 Cases on Bills & Notes, 880) cites as agreeing with this case *De Tastet, ex parte*, 1

partial payment of a bill by any party to it inures to the benefit and is a discharge *pro tanto* of the liability of all subsequent parties. Consequently any payment or dividend received by the holder from a prior party before proof in bankruptcy against a subsequent party must be deducted from the amount of the claim provable against the latter."¹

§ 183. **Transferee of Bonâ Fide Holder substituted to his Rights, though himself chargeable with Equities.** — One who takes a bill or note from a *bonâ fide* holder for value thereof will be substituted to all the rights of such holder, although he himself takes it overdue, or with notice of facts which would otherwise constitute a defence to the note or bill in his hands.² But an indorser is not always by his payment subrogated to all the rights of the holder from whom, upon his payment, he takes the note, against prior parties thereto. If the notice of dishonor sent by the holder to the first indorser was wrongly addressed in consequence of erroneous information carelessly given by the second indorser to the holder, though the latter, having used due diligence, might

Rose, 10; Ellerhorst, *in re*, 5 N. B. R. 144; Harris, *ex parte*, 2 Lowell, 568, and says that Cooper v. Pepys, 1 Atk. 106; Leers, *ex parte*, 6 Ves. 644; Worrall, *ex parte*, 1 Cox, 309; Taylor, *ex parte*, 1 De G. & J. 302; Oriental Bank, *in re*, L. R. 6 Eq. 582; and Howard, *in re*, 4 N. B. R. 571, *contra*, are not to be supported.

¹ 1 Ames's Cases on Bills & Notes, 880, citing Ryswick, *ex parte*, 2 P. Wms. 89; Wyldman, *ex parte*, 2 Ves. Sen. 115; S. C. 1 Atk. 109; Royal Bank, *ex parte*, 2 Rose, 197; Weeks, *in re*, 13 N. B. R. 263; Sohler v. Loring, 6 Cush. (Mass.) 537; Blake v. Ames, 8 Allen (Mass.), 318; National Bank v. Porter, 122 Mass. 308.

² Carruthers v. West, 11 Q. B. 143; Fairclough v. Pavia, 9 Exch. 690; May v. Chapman, 16 M. & W. 355;

Robinson v. Reynolds, 2 Q. B. 196, 211; Chalmers v. Lanion, 1 Campb. 383; Commissioners v. Clark, 94 U. S. 278; Dillingham v. Blood, 66 Maine, 140; Roberts v. Lane, 64 Maine, 108; Woodman v. Churchill, 52 Maine, 58; Barker v. Parker, 10 Gray (Mass.), 339; Williams v. Matthews, 3 Cow. (N. Y.) 252, 260; Wilson v. Mechanics' Bank, 45 Penn. St. 488, 494; Prentice v. Zane, 2 Gratt. (Va.) 262; Boyd v. McCann, 10 Md. 118; Hogan v. Moore, 48 Ga. 156; Bassett v. Avery, 15 Ohio St. 299; Kost v. Bender, 35 Mich. 515; Woodworth v. Huntoon, 40 Ills. 131; Riley v. Schawacker, 50 Ind. 592; Mornyer v. Cooper, 35 Iowa, 257; Cotton v. Sterling, 20 La. Ann. 282; Cook v. Larkin, 19 La. Ann. 507; Howell v. Crane, 12 La. Ann. 126.

have held the first indorser to pay the note,¹ yet the second indorser, upon taking up the note from the holder, cannot do so; for it was his fault that the notice was not properly sent.² The principle that a notice given by the holder will inure to the benefit of the other parties to a bill or note³ does not apply to such a case.

§ 184. **Acceptor of Bill *supra* protest substituted to Rights of Holder from whom he takes it.** — The acceptor of a bill *supra protest* for the honor of a particular party to the bill succeeds to the rights of the party from whom he takes it, except that he discharges all the parties to the bill subsequent to the one for whose honor he takes it up, and that he cannot indorse it over.⁴ Accordingly such an acceptor can recover on the bill against any prior parties thereto who could have been held by the person from whom he receives it, or by any prior holder of the bill, even though they could not have been held by the one for whose honor such acceptor has taken up the bill.⁵ As the liability of the acceptor *supra protest* is that of an indorser,⁶ so, when he takes up the bill upon such an acceptance, he is entitled to hold antecedent parties as an indorser could do.⁷

§ 185. **Transferees of Notes or Bills entitled to the Benefit of Security held for their Payment.** — The right to enforce security given for the payment of a note will pass to the indorsees or transferees of the note, even though the security itself has not been formally transferred or delivered to them.⁸ If the

¹ *Lambert v. Ghiselin*, 9 How. 552.

² *Beale v. Parish*, 20 N. Y. 407, overruling S. C. 24 Barb. (N. Y.) 243.

³ *Palen v. Shurtleff*, 9 Met. (Mass.) 581; *Stafford v. Yates*, 18 Johns. (N. Y.) 327; *Mead v. Engs*, 5 Cow. (N. Y.) 303; *Marr v. Johnson*, 9 Yerg. (Tenn.) 1.

⁴ *Swan, ex parte, Overend, in re*, L. R. 6 Eq. 344 (overruling *Lambert, ex parte*, 13 Ves. 167); *Wackerbath, ex parte*, 5 Ves. 574; *Mertens v.*

Winnington, 1 Espinasse, 113; *Goodall v. Polhill*, 1 C. B. 233; *Cox v. Earle*, 3 B. & Ald. 430; *Konig v. Bayard*, 1 Peters, 250.

⁵ *Swan, ex parte, Overend, in re, supra*.

⁶ *Williams v. Germaine*, 7 B. & C. 468; *Hoare v. Cazenove*, 16 East, 391; *Lenox v. Leverett*, 10 Mass. 1; *Schofield v. Bayard*, 3 Wend. (N. Y.) 488.

⁷ *Antea*, § 181.

⁸ *Vose v. Handy*, 2 Greenl. (Me.)

legal title to the security remains in the holder of the note, he will be considered to hold it as a trustee for their benefit.¹ When the purchaser of a melodeon gave his note for the price thereof, with the agreement that the property should not vest in him until his payment of the note, it was held that the vendor's interest in the melodeon was merely an incident to the note, as in the case of a mortgage or pledge, and that it passed to one to whom they indorsed the note, so that trover for the melodeon could not afterwards be maintained in the name of the vendors.² And after a transfer of the note to one who takes it *bonâ fide*, not overdue, and for value, the holder of the security cannot discharge it to the prejudice of the holder of the note.³ Such a taker of the note may enforce the security in the hands of the payee of the note, even though this payee could not himself have enforced the security against the maker of the note by reason of the equities between them,⁴

322; *Blake v. Williams*, 36 N. H. 39; *Keyes v. Wood*, 21 Vt. 331; *Dudley v. Cadwell*, 19 Conn. 218; *Evertson v. Booth*, 19 Johns. (N. Y.) 486; *Pattison v. Hull*, 9 Cow. (N. Y.) 747; *West's Appeal*, 88 Penn. St. 341; *Partridge v. Partridge*, 38 Penn. St. 78; *Phillips v. Lewistown Bank*, 18 Penn. St. 394; *Hyman v. Devereux*, 63 Nor. Car. 624; *Muller v. Wadlington*, 5 So. Car. 342; *Martin v. McReynolds*, 6 Mich. 70; *Mapps v. Sharpe*, 32 Ills. 13; *Pardee v. Lindley*, 31 Ills. 174; *French v. Turner*, 15 Ind. 59; *Indiana Bank v. Anderson*, 14 Iowa, 544; *Bange v. Flint*, 25 Wisc. 544; *Burdett v. Clay*, 8 B. Mon. (Ky.) 287; *Jackson v. Rutledge*, 3 Lea (Tenn.), 626; *Wolfe v. Nall*, 62 Ala. 24; *Graham v. Newman*, 21 Ala. 497; *Hobson v. Edwards*, 57 Miss. 128; *Dick v. Maury*, 9 Sm. & M. (Miss.) 448; *Potter v. Stevens*, 40 Mo. 229; *Scott v. Turner*, 15 La. Ann. 346; *Bennett v. Soloman*, 6 Calif. 134; *Biscoe v. Royston*, 18 Ark. 508. *Contra*, in the somewhat anomalous

case of a vendor's lien, *Shall v. Biscoe*, 18 Ark. 142; *Rogers v. James*, 33 Ark. 77; *Pillow v. Helm*, 7 Baxter (Tenn.), 545.

¹ *Wolcott v. Winchester*, 15 Gray (Mass.), 461; *Young v. Miller*, 6 Gray (Mass.), 152; *Hamilton v. Lubukee*, 51 Ills. 415; *Sargent v. Howe*, 21 Ills. 148; *Gordon v. Mulhare*, 13 Wisc. 22; *Graham v. Newman*, 21 Ala. 497; *Colt v. Barnes*, 64 Ala. 108; *Burhans v. Hutcheson*, 25 Kans. 625.

² *Esty v. Graham*, 46 N. H. 169. But see *Domestic Sewing Machine Co. v. Arthurhultz*, 63 Ind. 322.

³ *Gordon v. Mulhare*, 13 Wisc. 22; *Keohane v. Smith*, 97 Ills. 156; *McCormick v. Digby*, 8 Blackf. (Ind.) 99; *Gottschalk v. Neal*, 6 Mo. App. 596.

⁴ *Carpenter v. Longan*, 16 Wallace, 271 (overruling *Longan v. Carpenter*, 1 Col. Ter. 205); *Pierce v. Faunce*, 47 Maine, 507; *Sprague v. Graham*, 29 Maine, 160; *Taylor v. Page*, 6

although this has sometimes been denied where the security is a mortgage;¹ but one who takes the note overdue will not be protected by this principle against such equities of the owner of the security.² The equitable lien of a vendor of land to secure the payment of a note which he has taken for the purchase-money will not pass to an indorsee who cannot hold the vendor for the payment of the note, since the effect of the transfer was to secure to the vendor all the advantages of a payment.³

§ 186. **Rights of a Stranger upon taking up a Note.** — When, at or after the maturity of a promissory note, one who is not interested in its payment, either as indorser or as surety, takes it up, declining to have it cancelled, but saying nothing about buying it, and making no arrangement for a conventional subrogation to the rights of the holder, he is not subrogated to those rights; but the note is paid and satisfied, and the indebtedness of the maker is extinguished.⁴ But if a stranger has made such a payment without a previous authority from the debtor, and before any ratification of the payment by the debtor the creditor and the stranger undo the transaction, and the creditor returns the money to the stranger, it is then too late for the debtor to ratify the payment, and the creditor can enforce the original obligation against him.⁵ Such a payment made by a stranger becomes an efficacious payment only

Allen (Mass.), 86; Breen *v.* Seward, 11 Gray (Mass.), 118; Green *v.* Hart, 1 Johns. (N. Y.) 580; Jackson *v.* Blodgett, 5 Cow. (N. Y.) 202; Gould *v.* Marsh, 4 Thomp. & C. (N. Y.) 128; S. C. 1 Hun (N. Y.), 566; Bloomer *v.* Henderson, 8 Mich. 395; Judge *v.* Vogel, 38 Mich. 568; Cornell *v.* Hichens, 11 Wisc. 353; Croft *v.* Bunster, 9 Wisc. 503.

¹ Johnson *v.* Carpenter, 7 Minn. 176; Baily *v.* Smith, 14 Ohio St. 396; White *v.* Sutherland, 64 Ills. 181; Sumner *v.* Waugh, 56 Ills. 531; Walker *v.* Dement, 42 Ills. 272; Olds

v. Cummings, 31 Ills. 188; Foster *v.* Strong, 5 Ills. App. 223; Grassly *v.* Reinback, 4 Ills. App. 341; Bouligny *v.* Fortier, 17 La. Ann. 121; Jennings *v.* Vickers, 31 La. Ann. 679.

² Fish *v.* French, 15 Gray (Mass.), 520; Howard *v.* Gresham, 27 Ga. 347.

³ Barnett *v.* Riser, 63 Ala. 347; Baukhead *v.* Owen, 60 Ala. 457; Hightower *v.* Rigshy, 56 Ala. 126.

⁴ Burr *v.* Smith, 21 Barb. (N. Y.) 262; Oliver *v.* Bragg, 15 La. Ann. 402.

⁵ Walter *v.* James, L.R. 6 Exch. 124.

when it is ratified or adopted by the debtor, although such ratification and adoption may be made and shown by the debtor's setting up the payment as a defence in an action against him on the note.¹ A third person who has given to the holder of a note his written agreement to be holden for its payment like an indorser will neither be regarded as a mere stranger nor yet as a party to the note; and if he pays the note upon the default of the parties to it, he is entitled to the note undischarged, and may maintain an action thereon for his reimbursement.² And if a stranger takes up a note, this will be deemed a purchase and not an extinguishment thereof, if such was the intent of the parties.³

§ 187. **Holder of Note substituted to Benefit of Mortgage given by one to another Party to the Note to secure its Payment.**—Property mortgaged to secure to the mortgagee the payment of notes indorsed by the mortgagee for the benefit of the mortgagor will be applied in equity, upon the insolvency of both maker and indorser, to the payment of such notes.⁴ And such a mortgage, not being given merely for the indemnity of the mortgagee, cannot be released by him so as to deprive the holders of the notes of their rights under the mortgage.⁵ The owner of real estate mortgaged it to a building association, the mortgage purporting to be made to secure the payment of a loan of money therein stated to have been made by the mortgagee to the mortgagor. No money was, however, actually advanced by the mortgagee; but instead thereof it issued its promissory notes to the mortgagor, payable to his order, which he agreed to accept as money. One of these notes, not being paid at maturity, was replaced by another, payable to the order of the mortgagor and indorsed by him, and bearing a certifi-

¹ *Simpson v. Eggington*, 10 Exch. 845; *Martin v. Quinn*, 37 Calif. 55. See *Dodge v. Freedman's Savings Co.*, 93 U. S. 379.

² *Bishop v. Rowe*, 71 Maine, 263. See *Pacific Bank v. Mitchell*, 9 Met. (Mass.) 297.

³ *Swope v. Leffingwell*, 72 Mo. 348.

⁴ *Rice v. Dewey*, 13 Gray (Mass.), 47; *Ohio Life Ins. Co. v. Winn*, 4 Md. Ch. Dec. 253.

⁵ *Boyd v. Parker*, 43 Md. 182; *Hartford & N. Y. Transportation Co. v. Hartford Bank*, 46 Conn. 569.

cate from the secretary of the association that it was secured by a mortgage of the real estate. This note came before maturity into the hands of a holder for value. Afterwards the association became insolvent; and an insurance company, holding the notes of the association for a large amount, made an arrangement by which it surrendered these notes to the amount of the balance due upon the mortgage, the association released its mortgage, and the mortgagor gave a new mortgage to the insurance company to secure the same amount. The insurance company at the time of this transaction made no inquiry as to whether any of the notes given as aforesaid to the mortgagor were still outstanding. The holder of this note then claimed by a bill in equity that his note should be paid out of the proceeds of the mortgaged property in preference to the claim of the insurance company under its mortgage; and it was held that, being the holder of the note and consequently of the real debt secured by the mortgage, he was in equity to be considered the mortgagee, or as substituted to all rights secured by the mortgage upon the property; that the release of the mortgage by the association without payment of his debt did not destroy his lien upon the property; that the insurance company was not to be regarded as having taken its mortgage *bond fide* without notice of his equity; and that he was entitled to be paid out of the mortgaged property in preference to the insurance company.¹

§ 188. **Substitution of the Holder to the Benefit of Indemnity held by an Indorser.** — Security given by the maker of a note to his accommodation indorser thereon, to indemnify the latter against his liability, is not an accessory to the principal obligation, but merely a personal indemnity, ordinarily available only upon payment by the indorser.² Such an indemnity would not be available to a surety upon the note who had been compelled to pay it; for the maker, though a surety, and an

¹ *McCracken v. German Ins. Co.*, 114; *Hartford & N. Y. Transp. Co. v. 43 Md.* 471.

² *O'Hara v. Baum*, 88 Penn. St. *v. Creditors*, 16 La. Ann. 292.

accommodation indorser are not co-sureties;¹ nor are an accommodation maker and an accommodation indorser entitled to the rights of co-sureties against each other.² Nor have successive accommodation indorsers the rights of co-sureties against each other, unless they have agreed to become such as among themselves.³ The holder of the note cannot in equity be substituted to the benefit of the indorser's indemnity, when he has obtained no judgment against either maker or indorser, and makes no allegation in his bill that either is insolvent,⁴ or that the debt cannot be collected by judgment and execution at law.⁵ If the indorser has been discharged from his liability upon the note by the neglect of its holder to give him proper notice upon its dishonor, the security held for his indemnity is discharged, and neither the holder nor any other party to the note can claim the benefit of such security by subrogation or substitution to his rights;⁶ for an indorser does not, by taking security against his indorsement, waive his right to notice.⁷ But the holder is entitled to the benefit of any securities received by an insolvent indorser as a surety for prior parties.⁸ If all the indorsers of a bill of exchange have become such for the accommodation of the drawer, and he gives a deed of trust for the indemnity of the two last indorsers, the first indorser cannot compel them to sell the trust property and apply it to the payment of the bill; he will have no right of subrogation to their security until he pays the bill.⁹

¹ *Dawson v. Pettway*, 4 Dev. & Bat. Law (Nor. Car.), 396; *Nurre v. Chittenden*, 56 Ind. 462.

² *Smith v. Smith*, 1 Dev. Ch (Nor. Car.) 173.

³ *Stillwell v. How*, 46 Mo. 589; *McCune v. Belt*, 45 Mo. 174; *Armstrong v. Cook*, 30 Ind. 22.

⁴ *Antea*, §§ 160, 161.

⁵ *Ohio Ins. Co. v. Reeder*, 18 Ohio, 35.

⁶ *Virginia Bank v. Boissean*, 12 Leigh (Va.), 387.

⁷ *Ray v. Smith*, 17 Wallace, 411,

415; *Haskell v. Boardman*, 8 Allen (Mass.), 38; *Moses v. Ela*, 43 N. H. 557; *Seacord v. Miller*, 13 N. Y. 55; *Kramer v. Sandford*, 4 Watts & Serg. (Penn.) 328; *Denny v. Palmer*, 5 Ired. Law (Nor. Car.), 610; *Wilson v. Senior*, 14 Wise, 380; *Peets v. Wilson*, 19 La. 478. But see *Story on Prom. Notes*, §§ 281, 282, and cases there cited.

⁸ *In re Jaycox*, 8 N. B. R. 241.

⁹ *Dunlap v. Clements*, 7 Ala. 539; *Buffalo Bank v. Wood*, 71 N. Y. 405.

§ 189. **Bill drawn against a Consignment of Merchandise and made a Lien upon it.** — The indorsee of a bill which purports to be drawn against a consignment of merchandise, and has annexed to it a warehouse receipt for the merchandise and a certificate of the drawer by which he declares a lien upon the merchandise in favor of the holder of the bill, reserving, however, to the consignee upon whom the bill is drawn the right to sell the merchandise upon its arrival and hold its proceeds instead in trust for the holder of the bill, acquires by taking the bill a special property in the merchandise thus appropriated for its payment, and may enforce the trust by a bill in equity against the consignee and one to whom the latter has pledged the property after accepting the bill.¹ If, however, the acceptor on his acceptance was to acquire against the drawer the full control of the property, or if the property had been delivered to the carrier as agent for the consignee, upon whom the bill was drawn, though the carrier's receipt was annexed to the bill,² the case would be different. A Liverpool merchant, wishing to obtain consignments of cotton from a Pernambuco firm, and being called upon to give some security other than his own, obtained from a bank a letter of credit, by which the bank authorized the Pernambuco firm to draw upon them for consignments of cotton, sending the shipping documents to the bank, and promising to honor the bills upon receipt of the shipping documents. Some shipping documents were sent, and some bills accepted; and one bill was accepted without any shipping documents being sent; and then, before any of the bills fell due, the bank became bankrupt, and bills arriving immediately afterwards were unaccepted. The agent of the Pernambuco firm claimed to prove against the bank for the full amount of the bills, without bringing into the account the value of the cotton which had been sold, or which remained on hand; but it was held that he had no right to do so; that the

¹ *Michigan Bank v. Gardiner*, 15 Gray (Mass.), 362.

² *Wigton v. Bowley*, 130 Mass. 252.

holders of the bills had no lien upon the cotton in the hands of the bank, so as to enable them to treat the bank as their trustee; but that the bank was indebted to the holders of the bills only for the surplus remaining after the goods consigned had been applied to the payment of the bills.¹

§ 190. **Securities held by a Banker against his Acceptances available to their Holders.** — Securities held by a banker against his acceptances are available to the holders of the bills, through the equity of the banker or his assignees in bankruptcy to have them applied to meet the acceptances.² On the same principle, the indorser of a bill of exchange has an equitable claim upon property deposited with the drawee as a security against his acceptance thereof, upon the latter's bankruptcy.³ The application of this principle will not be prevented by the fact that the person who deposited the security was not a party to the bills either as drawer or indorser, provided they were drawn with respect to a transaction in which he was liable.⁴ Where merchants consigned goods to one party, and by arrangement drew bills for their value upon another party, who accepted them, and the former made remittances to the latter to enable him to meet the bills, it was held, upon the bankruptcy of both, that these remittances should be specifically applied to the payment of the bills.⁵ A mortgage given to the acceptor of bills to secure their payment by the drawer will, upon the insolvency of the drawer and the acceptor, be applied directly to the payment of the bills.⁶ So, where one who has procured bills to be drawn for his accommodation afterwards gives a deed of trust to the acceptors thereof to secure promissory notes given to the acceptors for the amount of the acceptances, the holders of the bills may resort to the

¹ *Banner v. Johnson*, L. R. 5 Ho. Lds. 157.

² *Waring, ex parte*, 19 Ves. 345.

³ *Perfect, ex parte*, Mont. Bukey. 25.

⁴ *Smart, ex parte, Richardson, in re*, L. R. 8 Ch. 220.

⁵ *Smart, ex parte, Richardson, in re, supra.*

⁶ *City Bank v. Luckie*, L. R. 5 Ch. 773.

trust property for their payment when dishonored, if the promissory notes have not been negotiated to *bonâ fide* holders for a valuable consideration.¹ Where the holders of a judgment given to secure them for their acceptances made for the benefit of the judgment-debtor assigned it to a prior creditor of their own, the collection of the judgment by such assignee was restrained on a bill in equity filed by the judgment-debtor for whose benefit the acceptances had been made, and the proceeds of the judgment were directed to be applied to the payment of the acceptances, the Chancellor declaring that the holders of the acceptances had, to that extent, an equitable interest in the judgment.²

§ 191. **This Principle extends to all Parties to the Bill.** — This principle of substitution to the benefit of security held for the payment of negotiable paper will be applied for the benefit of all parties thereto who, by reason of their liability thereon, have paid the same. One who has accepted a bill of exchange on the agreement that certain property of the drawer in his hands shall be applied to the payment thereof, is entitled, upon paying the acceptance out of his own funds, to hold this property for his reimbursement against attaching creditors of the drawer.³ The payee of a promissory note who has transferred it by indorsement, and has afterwards, on the failure of the maker, been compelled to take it up, is entitled to enforce a mortgage given by the maker of the note to the indorsee, while it was held by the latter, to secure its payment.⁴ If the holder of a promissory note who has proved it against the estate of the first indorser, and has then received payment of it from the second indorser, afterwards obtains a dividend in the bankruptcy proceedings, he must account for the amount of this dividend to the second indorser, and not to the bankrupt's creditors.⁵ If debtors have given acceptances to their creditor

¹ Toulmin v. Hamilton, 7 Ala. 362.

⁸ Printup v. Johnson, 19 Ga. 73.

² Heath v. Hand, 1 Paige (N. Y.), 329; Auburn Bank v. Throop, 18 Johns. (N. Y.) 505.

⁴ O'Hara v. Haas, 46 Miss. 374.

⁵ Selfridge v. Gill, 4 Mass. 95; *antea*, §§ 181, 182.

for the amount of their debt, and have also given to him security for the payment of the same indebtedness, and have then gone into bankruptcy, and the holders of the bills have proved them for their full amount under the bankruptcy, the creditor will not be allowed the full benefit of the security until he shall himself have taken up these bills: the security will be applied first to pay to the creditor any balance due to him over the amount of the bills, and then to relieve him from his liability under the bills.¹

§ 192. **Property in Securities deposited by Drawer with Acceptor.** — The property in securities deposited by the drawer with the acceptor of bills for their payment remains, subject to the trust, in the drawer; and so far as not applied for that purpose they are held by the acceptor for the drawer. G in Malaga was in the habit of drawing bills on Y in London, and of remitting bills to the latter to enable him to meet his acceptances. Y rendered to G half-yearly accounts, made up as follows: Bills accepted were entered on the debit side, and interest was charged thereon to the day of making up the account; bills remitted were entered on the credit side, with a credit of interest to the same time; if a bill remitted was dishonored, then the amount of such bill and interest was entered on the debit side, thus in effect striking it out of the account. G became insolvent, and compounded with his creditors. Crediting Y with the amount he thus paid on his acceptances, the balance of account was in favor of G. At the time of suspending payment, Y had remittances which had been thus sent to him by G. It was held that as Y had been discharged from his liability on his acceptances by his composition, and as the remittances were specifically appropriated to the payment of the acceptances, the remainder of the remittances after Y had been reimbursed for the amount that he paid on the bills belonged to G.² But if the remittances, being nego-

¹ Mann, *ex parte*, Kattengell, *in re*,
5 Ch. Div. 367.

² Gomez, *ex parte*, Yglesias, *in re*,
L. R. 10 Ch. 639.

tiable paper or current coin, had been passed for value to a *bonâ fide* holder without notice of the equities existing in favor of the drawer, the drawee could not reclaim them from such a holder.¹ On the same principle, if the acceptor of bills deposits with one banker money and negotiable securities for the express purpose of taking up his acceptances payable at another banker's, and the first banker remits part of the money and securities to the second without notice of the instructions on which they were received, the acceptor cannot follow the property into the hands of the second banker to the prejudice of the latter's rights against the first.²

§ 193. **Holder not substituted to Security held by one under no Liability, unless actually appropriated.** — The holder will not, upon the insolvency or bankruptcy of both drawer and drawee, be substituted to the benefit of security deposited by the drawer with the drawee to secure the latter against his intended acceptances, in case the drawee has not accepted the bills, nor in any other case in which the holder has not the right to prove his demand against the estate of both the drawer and the drawee.³ Nor will such substitution be allowed if the security is held by the acceptor, not specifically against the acceptances, but for the payment of any money which should be due from the drawer to the acceptor, even though there may be no indebtedness apart from the bills.⁴ If the drawer of bills has made remittances to the acceptor to cover his acceptances, and the acceptor has become insolvent before the payment of the bills, and the drawer has also become insolvent, owing the acceptor on general account a larger sum than the amount of the bills, but has not gone into bankruptcy, the equity of the holders of the bills to have these remittances applied to their payment will not prevail over the direction of the drawee to have them applied upon his general indebtedness

¹ *Banco de Lima v. Anglo-Peruvian Bank*, 8 Ch. Div. 160.

² *Johnson v. Robarts*, L. R. 10 Ch. 505.

³ *Vaughan v. Halliday*, L. R. 9 Ch. 561.

⁴ *Levi's case*, L. R. 7 Eq. 449.

to the acceptor.¹ But an actual appropriation to the payment of bills of property consigned by the drawer to the drawee will be upheld, although the latter has not accepted the bills.² The consignor of coffee drew bills at thirty days' sight upon the consignees, which bills were negotiated to the plaintiff. There was nothing upon the bills to show that they were drawn against any particular shipment. The consignee refused to accept the bills, and they were protested. The consignor then wrote to one S, asking him to take charge of the consignment, realize on it, and honor the bills. The day before the maturity of the bills, S wrote to the plaintiff, saying that he expected soon to receive from the consignees the coffee sent by the drawer against the bills, and would then write the plaintiff again. Soon afterwards S received the warrants for the coffee from the consignees, and wrote to the plaintiff to that effect, referring to his previous letter, and saying he should dispose of the coffee as instructed by the consignor, and would send further particulars in due time. The same day the consignees attached the coffee as the property of a firm who they alleged and had been informed by the consignor had an interest in it, but with whom S had had no dealings; but it was held, on the plaintiff's bill in equity, that the consignors had given S authority to make an equitable charge upon the property, and S had acted on that authority, and that the coffee must be applied to the payment of the bills.³

§ 194. **Right of Holders to Securities held by Acceptor not a paramount one.** — This right of the holders of negotiable paper to be substituted to the benefit of securities for its payment given by one of the debtors upon it to another cannot be preferred to the legal rights of prior creditors of both these debtors in the same transaction. This principle was established in an English case, in which it appeared that two separate firms, one in Bombay and one in London, were engaged

¹ General South American Co., *ex parte*, Yglesias, *in re*, L. R. 10 Ch. 635. ² Frith v. Forbes, 4 De G., F. & J. 409; *antea*, § 189.

³ Ranken v. Alfaro, 5 Ch. Div. 786.

in the joint adventure of buying and selling goods in England and in India. The Bombay firm were accustomed to draw bills on the London firm, which they discounted in India; and with the proceeds they bought cotton, which they consigned to London, specially to meet these acceptances. Both firms being insolvent, the holders of certain unpaid bills which had been drawn and accepted in this way claimed to have the proceeds of certain shipments of cotton appropriated to their payment; and it was held that they were entitled to this appropriation, but that it must be subject to the right of the creditors, if any, of the joint adventure to have the cotton applied first to their payment as part of the assets of the joint adventure.¹ And it has been intimated that the rule that securities held by a banker against his acceptances are available to the holders of the bills will not be applied in bankruptcy where the drawers owe the acceptors on other accounts more than the amounts of the bills, at least if the acceptors have a general lien on the securities so deposited with them.² So, where the acceptor of a bill paid the amount thereof to his bankers in order to meet it, but the day before the bill matured died indebted to his bankers on general account, and the bankers dishonored the bill, whereupon the drawer, having been compelled to take up the bill, sought to compel the bankers to reimburse him, as having received the amount of the bill in trust for its payment, it was held that he could not maintain his suit.³

§ 195. **Holder's Right to control Securities given by Drawer to Acceptor no greater than Drawer's.** — The right of the holders of bills to the benefit of property deposited by the drawer with the acceptor thereof will, even upon the bankruptcy of the acceptor, be limited by the right of the drawer against him. It will not extend to the case of a guaranty given to the acceptor by a third person, no notice having been given by the holder to the guarantor.⁴ If the drawer could

¹ Dewhurst, *ex parte*, Leggatt, *in re*,
L. R. 8 Ch. 965.

³ Hill v. Royds, L. R. 8 Eq. 290.

² Hickie's Case, L. R. 4 Eq. 226.

⁴ Barned's Banking Co., *in re*, L. R.
3 Ch. 753.

not require the proceeds of the property to be specifically appropriated to the payment of the bills, the holder will have no such right.¹ Thus, A in England employed B in South America to purchase goods for him. The mode adopted was that B raised money by drawing bills on A and selling them, and with the proceeds bought goods, which he shipped to Liverpool, consigned to A. In his accounts, B credited A with the bills, and charged him with the cost of the goods and with his commissions; and in his letters he directed A to place the price of the goods to his credit and the bills to his debit. Both A and B became bankrupt. At the time when A became bankrupt, goods were in transit to Liverpool; and some of the bills out of the proceeds of which the goods had been bought had been accepted, and others were presented to A soon after his bankruptcy, and were unaccepted. The goods having arrived and come into the possession of A's trustees in bankruptcy, the holders of the bills claimed to have the proceeds of the goods applied to the payment of both the accepted and the unaccepted bills. But it was held that the holders of the bills had no right to have the goods specifically appropriated to their payment. The property in the goods passed to A, subject only to B's right of stoppage *in transitu*; it did not revert in B upon A's failure to accept some of the bills; and it did not appear that there was any agreement by which B would have a charge on the goods in the hands of A and a right to have them applied to the taking up of the bills.² If the property was purchased originally at the joint risk of the drawer and the drawee, although the drawee has promised the drawer to protect the bills, but has afterwards, upon the insolvency of the drawer, refused to accept them, the right of the holders of the bills to the property will be limited to the surplus of its proceeds over the amount due from the drawer to the drawee.³ A mere direction in a

¹ Banner, *ex parte*, Tappenbeck, *in re*, 2 Ch. Div. 278.

² Banner, *ex parte*, Tappenbeck, *in re*, *supra*.

³ Robey v. Ollier, L. R. 7 Ch. 695, limiting and explaining Frith v. Forbes,

4 De G., F. & J. 409.

bill of exchange to place the amount to the account of a shipment made by the drawer to the acceptor will not operate a specific appropriation of that shipment to the payment of the bill, which can be enforced against a purchaser of the goods from the acceptor,¹ just as the mere fact that bills are given in partial payment for property agreed to be sold by the drawer to the acceptor, upon which the seller retains a lien for the unpaid portion of the price, will not, upon the bankruptcy of both parties, give to the persons to whom the bills have been negotiated any lien upon the property for their payment.²

§ 196. **Holder's Right to Application of Security perishes with that of its Depositor.** — If the drawer of bills holding security from the acceptor for their payment has, by the substitution of new bills therefor, lost the right, as against the acceptor, to have the security applied for their payment, the holder of the old bills, claiming under the drawer, will also be deprived of such right. Thus, a debtor borrowed money from a corporation, giving it his acceptances, and depositing shares as security therefor. When the bills became due, the corporation sent him fresh bills for acceptance, with a letter stating them to be in place of those falling due; and he accepted the new bills in accordance with the letter. He then died insolvent; and the corporation also became insolvent. Both sets of bills being still outstanding, it was held that the holders of the first bills had no equity to have them paid out of the shares; for the letter and the debtor's new acceptances had put an end to the security as to the first set of bills.³ But it is to be observed that the first set of bills did not purport to be drawn against the security.⁴

§ 197. **Taking Bill on the Credit of the Funds is not enough.** — Although the drawer of a bill has funds in the hands of the drawee, and the holder takes it upon the assurance of the

¹ *Entwistle, in re, Arbuthnot, ex parte*, 3 Ch. Div. 477.

² *Lambton, ex parte, Lindsay, in re*, L. R. 10 Ch. 405.

³ *General Rolling Stock Co., in re*, L. R. 4 Ch. 423.

⁴ See *McCracken v. German Ins. Co.*, 43 Md. 471.

drawer that the funds are specifically appropriated to the payment of the bill, this assurance will not of itself operate such an appropriation. Thus, where the New Orleans Bank drew a bill of exchange upon the Liverpool Bank in favor of the plaintiffs, who bought on the assurance of the New Orleans Bank that funds were lying in the Liverpool Bank which were specifically appropriated to meet it, but before the acceptance of the bill the New Orleans Bank stopped payment, although it was at first considered, upon the plaintiffs' bill against both banks, that the plaintiffs, having taken the bill upon the faith of these representations, were entitled to be paid its amount out of the funds of the drawer in the hands of the Liverpool Bank,¹ yet on appeal it was decided that the plaintiffs had no right to any charge upon these funds.² Where one bank has deposited bonds with another bank as security against its overdrafts, and has then become insolvent, being indebted to the second bank, the holders of such bills, drawn by the first bank before its insolvency but presented afterwards, cannot resort to the proceeds of these bonds to the prejudice of the right of the second bank to apply them upon its own demand.³

§ 198. **Extent of Holder's Right of Substitution to Acceptor's Securities.** — The substitution of the holder of a bill to securities held by the acceptor will, if the parties to the bill have not become insolvent, be limited to the rights of the acceptor. If the acceptor's security is a mortgage from the drawer, conditioned only to indemnify him for what money he should actually have paid upon his acceptance, then, as the acceptor would not have the right to enforce his security until actual payment by him, the holder of the bill cannot require a foreclosure of the mortgage for its payment.⁴ The acceptor holding such indemnity may, before the rights of the creditors arise upon his insolvency, release the whole or part of it to the

¹ Thomson v Simpson, L. R. 9 Eq. 497.

² Thomson v. Simpson, L. R. 5 Ch. 659.

³ Garvin v. State Bank, 7 So. Car. 266.

⁴ Planters' Bank v. Douglass, 2 Head (Tenn.), 699.

drawer; and the holder of the bills cannot, upon the acceptor's subsequent insolvency, avoid such release against those who have since acquired rights in the released property.¹

§ 199. **Rights of an Acceptor to Securities held against the Bill by Prior Parties thereto.**—The acceptor of a bill, being the party primarily liable upon it, cannot, upon paying it, be subrogated to the benefit of a security given by the drawer to the payee to secure its payment. Thus, where the purchaser of property gave to the vendor a mortgage on the property to secure the payment of a bill drawn by the purchaser in favor of the vendor upon a third person for the price of the property, the mortgage reciting that a lien was retained on the property in favor of the vendor or any other holder of the bill, but not stipulating that the drawee should have the benefit of the mortgage on paying the bill without having been put in funds therefor by the drawer, and without being bound as to the drawer to pay it, if the bill is paid by the drawee at its maturity without any conventional subrogation² in his favor at the time of the payment, the debt will be extinguished as to third persons, and the mortgage will be extinguished as to the holders of other liens upon the mortgaged property; for the acceptor was the principal debtor upon the bill, and simply paid his own debt in paying it; and the mortgage, containing no stipulation or reservation in his behalf, cannot be kept alive for his benefit, or for the benefit of any other person, unless this results from the terms of the bill itself.³ An indorser and an accommodation acceptor of a bill are not co-sureties; and the acceptor cannot be subrogated to the benefit of a mortgage given by the drawer to the indorser to indemnify the latter against his liability, even though the bill was paid after being protested by giving to its holder the note of the drawer, with the indorser and the acceptor as sureties thereon, and the acceptor on paying this note took an assignment of all

¹ *St. Louis Building Association v. Clark*, 36 Mo. 601.

² See *postea*, § 248 *et seq.*

³ *Salaun v. Relf*, 4 La. Ann. 575.

the securities in the hands of the indorser and of the holder.¹ The mortgage being given only for the personal indemnity of the indorser and not for the payment of the bill, the acceptor had no right to it; and on the indorser's being indemnified by the acceptor's payment of the substituted note, the mortgage became *functus officio*.² But in New York it has been decided that although at law one who accepts a bill for the accommodation of the drawer is regarded in favor of a *bonâ fide* holder of the bill as the principal debtor thereon, yet as between the drawer and such acceptor the latter is regarded in equity as merely a surety, and is entitled upon his payment of the bill to be subrogated to the benefit of any securities taken by the holder of the bill from the drawer to secure its payment; and accordingly, in an action against such an acceptor by a non-resident holder of the bill, the drawer having become insolvent, the defendant may, under the code authorizing the giving of both legal and equitable relief in the same action, put in an answer in the nature of a cross-bill against the plaintiff, demanding such subrogation upon payment of the amount due to the plaintiff.³

§ 200. **Acceptor's Securities to be applied upon all Acceptances alike.**—Security in the hands of an acceptor for the payment of his acceptances will, in case of need, be applied to the payment of all the acceptances alike. If the holders of some of the acceptances have established their right by litigation, they will be no further preferred than to cover a fair share of the expenses of their litigation. Thus, a drawer having given to his acceptor a judgment as security for his acceptances, these acceptances passed by indorsement into the possession of third parties; and some of them remained unpaid in the hands of three firms. The acceptor assigned a portion of the judgment to two of these firms, as collateral security for the payment of the drafts which they respec-

¹ *Gomez v. Lazarus*, 1 Dev. Eq. (Nor. Car.) 205.

² *Toronto Bank v. Hunter*, 4 Bosw. (N. Y.) 646.

³ *Gomez v. Lazarus*, *supra*.

tively held. They enforced the judgment at their own expense, and claimed to be fully paid out of its proceeds, leaving only a small balance for the benefit of the other firm, which had taken no part in the litigation. But it was held that the security of the judgment attached to all the unpaid acceptances alike, and that the holders were entitled to *pro ratâ* shares of the money which had been collected, but that the litigants should receive in addition to their dividend a fair share of the costs and expenses of their litigation, to be paid out of the dividend of the other party.¹ But the court also said that such third firm would be required to exhaust whatever independent securities they had for their demands, and should not be allowed to receive their *pro ratâ* share until such other securities had been exhausted or shown to be worthless, and that anything which they might receive from such securities should be reckoned as a part of their dividend, so as to increase the share of the two firms which had borne the burden of the litigation and had realized the fund.²

§ 201. **Whether Suits or Judgments extinguished upon Payment by Parties secondarily liable.**—If separate suits have been brought against the maker and the indorser of a promissory note, and the indorser pays the amount due with the agreement that the suit against the maker shall be prosecuted for his benefit, the maker cannot avail himself of the indorser's payment as a defence to the further prosecution of the suit against himself;³ nor, if the indorser's payment was made after judgment against the maker, can the maker's bail set up such a defence in an action upon their recognizance.⁴ If the maker and the indorser have been jointly sued under the New York statute, and a judgment has been recovered against them, the indorser, upon paying the judgment, may take an assignment thereof from the creditor, and use it for his indemnifica-

¹ *Kramer's Appeal*, 37 Penn. St. 71.

² *Kramer's Appeal*, *supra*.

³ *Antea*, §§ 181, 182.

⁴ *Mechanics' Bank v. Hazard*, 13 Johns. (N. Y.) 353.

tion as a subsisting judgment against the maker.¹ If an indorser of a bill of exchange has recovered a judgment thereon against the maker, an assignment of this judgment to a prior indorser who was liable on the bill, upon the latter's paying the amount due thereon, will not extinguish the judgment.² The indorser may be subrogated to the benefit of a judgment against the maker without taking an assignment thereof.³

¹ *Davis v. Perrine*, 4 Edw. Ch. (N. Y.) 62; *Corey v. White*, 3 Barb. (N. Y.) 12, overruling *Salina Bank v. Abbott*, 3 Denio (N. Y.), 181, and explaining *Ontario Bank v. Walker*, 1 Hill (N. Y.), 652. The statement in *Davis v. Perrine*, *supra*, that this rule has not been extended to the case of principal and surety has not since been followed in New York. *Antea*, § 137.

² *Harger v. McCullough*, 2 Denio (N. Y.), 119.

³ *Lyon v. Bolling*, 9 Ala. 463. See *antea*, § 135 *et seq.*

CHAPTER VI.

SUBROGATION IN THE ADMINISTRATION OF ESTATES.

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§ 202. **Subrogation of Executor or Administrator to Debts which he has paid.**—If an executor or administrator pays debts of the estate out of his own means to the value of the assets in his hands, he may apply these assets to reimburse himself; and by such election these assets become his own property.¹ And although, if an executor is ordered to sell land, he cannot himself retain it, as he may personal assets, yet, if the personal estate proves to be insufficient, and he has paid debts of the estate to the value of the land out of his own property, he may, when the land is ordered to be sold, retain the

¹ *Livingston v. Newkirk*, 3 Johns. Ch. (N. Y.) 312.

proceeds of such sale for his own indemnity.¹ So, if an executor or administrator has paid debts of the deceased to an amount exceeding the personal assets, he may for his indemnity be subrogated to the rights of the creditors whom he has paid against the lands of the deceased,² and may subject the real estate in the hands of the heirs for his reimbursement; and a surety of the administrator upon his payment may be subrogated to this right of his principal.³ Though an administrator acts at his own peril in paying debts of his intestate which have not a right of preference before he could lawfully be called upon to pay them, and if the estate afterwards turns out to be insolvent cannot charge it with the full amount so paid by him, yet, in the absence of statute regulations, he may be subrogated to the rights of the creditors whom he has thus satisfied, and may receive the distributive share of the assets to which they would have been entitled;⁴ and the same rule will be applied to any other trustee;⁵ but if his payments were made for his own relief, he will not as administrator be subrogated to an equitable lien which the creditor had upon the real estate of the deceased.⁶ An administrator who has made voluntary payments to a creditor of the estate will be protected by a subsequent decree in favor of such creditor.⁷ If he has employed assets of the estate to pay a debt owed by a legatee, he can look only to such legatee's share of the estate for his reimbursement.⁸ If one of two personal representatives has committed waste by applying the personal estate to the payment of debts which were properly chargeable upon the real

¹ *Livingston v. Newkirk*, *supra*.

⁵ *Salter v. Creditors*, 6 Bush (Ky.).

² *Gaw v. Huffman*, 12 Gratt. (Va.) 624.

628; *Kinney v. Harvey*, 2 Leigh (Va.), 70; *Smith v. Hoskins*, 7 J. J. Marsh. (Ky.) 502.

⁶ *McNeill v. McNeill*, 36 Ala. 109; *Ex parte Allen*, 89 Ills. 474; *Stott's Estate*, Myrick's Prob. (Calif.) 168.

³ *Taylor v. Taylor*, 8 B. Mon. (Ky.) 419.

⁷ *Charlton's Appeal*, 88 Penn. St. 476.

⁴ *Pierce v. Allen*, 12 R. I. 510; *McNeill v. McNeill*, 36 Ala. 109; 93.

⁸ *Johnson v. Henagan*, 11 So. Car.

Feemster v. Good, 12 So. Car. 573.

estate, the other representative, if compelled to pay to other creditors the amount so misapplied by his colleague, may hold the real estate in the hands of the heirs for his reimbursement;¹ for co-executors are not at the common law responsible for each other's waste.²

§ 203. **Such Subrogation must be seasonably claimed. Its Limitations.** — The claim of personal representatives to be substituted to the rights of creditors whom they have satisfied must be seasonably made.³ Though an executor who has, in pursuance of a bond given by his testator, made a deed with covenants of warranty, on which he has been sued and subjected to the payment of damages, is entitled to be subrogated to the rights of the obligee in the bond, and thereby to be reimbursed out of the estate, yet, if the estate was settled in chancery, and the executor failed to have himself protected in the decree for the settlement of the estate against the consequences of such a suit, which was pending against himself at the time of the decree, he cannot afterwards, without some explanation and excuse of his apparent laches, maintain a bill for his reimbursement against legatees to whom he has paid their legacies.⁴ Or, if his course of administration has been irregular and without regard to the rights of creditors, as by paying simple-contract debts and leaving specialties unpaid, his claim for reimbursement has no right of priority on a deficiency of assets.⁵ He must show that property charged by the will with the payment of debts has been faithfully administered and has proved to be inadequate, before he can be allowed a lien upon the testator's other estate for his indemnity.⁶ If an administrator has in his hands the proceeds of

¹ *Johnson v. Corbett*, 11 Paige (N. Y.), 265.

² *McKim v. Aulbach*, 130 Mass. 481; *Brazer v. Clark*, 5 Pick. (Mass.) 96; *Towne v. Ammidown*, 20 Pick. (Mass.) 535; *Douglass v. Satterlee*, 11 Johns. (N. Y.) 16, 21; *Hargthorpe v. Milforth*, Cro. Eliz. 318.

³ *Antea*, § 110.

⁴ *Lambert v. Hobson*, 3 Jones Eq. (Nor. Car.) 424.

⁵ *Greiner's Estate*, 2 Watts (Penn.), 414; *Moye v. Albritton*, 7 Ired. Eq. (Nor. Car.) 62.

⁶ *Frary v. Booth*, 37 Vt. 78, 93.

property to a sufficient amount to pay a preferred mortgage to which it is subject, and instead of paying the mortgage-debt pays another demand, he cannot recover back the latter payment, upon the fund subsequently, by reason of his own laches, becoming insufficient to pay the mortgage-debt.¹ The subrogation of a trustee to the rights of creditors to whom he has paid more than their proportion of the assets will not be for his own benefit, but for the protection of those creditors who have not received what they were entitled to demand.²

§ 204. **Subrogation in Favor of Creditors of Deceased. Marshalling of Assets.** — The equitable rule adopted in the marshalling of assets, that where one creditor has two funds to which he may resort for the satisfaction of his demand, another creditor who can hold only one of these funds may compel the former to take his satisfaction out of that to which the latter has no resort,³ is of general application in the settlement of estates,⁴ especially in those cases in which one class of creditors can avail themselves of both the real and the personal property of the deceased, while another class is restricted to the personal assets. If the creditors of the former class exhaust the personal estate, those of the latter class will be subrogated to their rights against the real estate, to the extent to which the former have appropriated the personal estate for their satisfaction.⁵ If a testator had purchased an estate in his lifetime, and after his death the purchase-money is paid out of his personal assets, the right of his simple-contract creditors, if necessary for their satisfaction, to be subrogated to the vendor's lien upon this estate against the devisees thereof, though at first left undecided,⁶ has since been established.⁷ But the creditor of an intestate is not, in the absence of special

¹ Succession of Foster, 4 La. Ann. 479.

⁴ Rice v. Harbeson, 63 N. Y. 493.

² Ellicott v. Ellicott, 6 Gill & J. (Md.) 35.

⁵ Aldrich v. Cooper, 8 Vesey, 382;

Cralle v. Meem, 8 Gratt. (Va.) 496.

⁶ Austen v. Halsey, 6 Vesey, 475.

³ *Antea*, § 61 *et seq.*

⁷ Selby v. Selby, 4 Russ. 336.

circumstances, entitled to be substituted to the rights of the heirs in respect of a debt due to them as such heirs.¹

§ 205. **Creditors subrogated to a Charge upon Property purchased from Funds of the Deceased Debtor.**—Where a widow, before the appointment of any administrator upon the estate of her deceased husband, took his assets, and used them in making a partial payment for land which she purchased, giving her note for the remainder of the purchase-money with a surety, and the surety afterwards paid the note, and took a deed of the land for his indemnity, it was decided that this surety held the title to the land in trust for the creditors and distributees of the deceased, subject, however, to his own prior lien for what he had been compelled to pay as surety upon the note.² This is an application of the familiar rule that the beneficiary of property which has been impressed with a trust character may follow the proceeds of such property into the hands of any one but a *bonâ fide* holder for value without notice.³

§ 206. **Creditors subrogated to Rights of Executors to Reimbursement.**—Since executors who are empowered by the will to carry on the testator's business after his decease, though personally liable for the trade-debts thereby contracted, have a right in equity to reimburse themselves for their payment of such debts out of the property which has been lawfully embarked in the trade, the trade-creditors may themselves in equity resort to this fund if their remedy against the executors is unavailing, and may even hold the fee-simple of land used for the purposes of the business;⁴ but such creditors cannot hold for the payment of their claims lands of the testator which he has devised in remainder to married women and infants, and has not by his will subjected to the risks of trade,

¹ *Turner v. Faucett*, 6 Ired. Eq. 338; *Rose v. Schaffner*, 50 Iowa, 483; (Nor. Car.) 549. *Hunter v. Bosworth*, 43 Wisc. 583;

² *Miller v. Birdsong*, 7 Baxter Whelan v. McCreary, 64 Ala. 319. (Tenn.), 531.

³ *Hopper v. Conyers*, L. R. 2 Eq. 791, reversing *Ferry v. Laible*, 31 N. J. 549; *Mount v. Suydam*, 4 Sandf. Ch. Eq. 566. (N. Y.) 399; *Dodge v. Cole*, 97 Ills.

merely because the executors have without authority used the proceeds of the business for the improvement of such land. The rights of the creditors cannot be carried further than those of the executors for whom they are substituted;¹ and accordingly if the executors are themselves in default to the trust estate, as the executors would not be entitled to indemnity except upon condition of making good their default, the creditors are in no better condition, and cannot have their debts paid out of the fund unless the default is first made good.²

§ 207. **Where the Creditor entitled to hold Two Funds.**—The common-law rule that the personal estate of a deceased person will be applied to the payment of his debts to the relief of his real estate³ will not be enforced when it is in apparent hostility to the intent of the deceased as expressed in his will, and would defeat bequests made therein.⁴ This principle was applied in a case in New York, in which it appeared that a deceased citizen of that State had by his will authorized his executors to reduce all the property real and personal of which he should die possessed in America into divisible shape, and after the payment of debts and testamentary expenses to divide it into seven shares, and distribute these in a specified manner. At the time of the execution of his will his property was mostly personal; but he afterwards purchased real estate in South Carolina, paying part of the purchase-money in cash, and giving his bond secured by a mortgage on the land for the remainder. The will was admitted to probate in New York as a will of both real and personal property, but in South Carolina only as a will of personal property, not having the number

¹ *Laible v. Ferry*, *supra*.

² *In re Johnson*, 15 Ch. Div. 548.

³ *Hanson v. Hanson*, 70 Maine, 508; *Livingston v. Newkirk*, 3 Johns. Ch. (N. Y.) 312; *Scott v. Morrison*, 5 Ind. 551; *Whitehead v. Gibbons*, 10 N. J. Eq. (2 Stockt.) 230; *McKay v. Green*, 3 Johns. Ch. (N. Y.) 56.

⁴ *Graves v. Hicks*, 6 Sim. 391; *Rogers v. Rogers*, 1 Paige (N. Y.), 188; *Manning v. Spooner*, 3 Vesey, 114; *Harvey v. Steptoe*, 17 Gratt. (Va.) 289; *Clinefelter v. Ayres*, 16 Ills. 329; *Marsh v. Marsh*, 10 B. Mon. (Ky.) 360; *Lightfoot v. Lightfoot*, 27 Ala. 351.

of witnesses required by the laws of that State for a will of real estate. All the legatees under the will were aliens, except the beneficiaries of one of the shares, to whom as heirs-at-law the real estate descended. The holder of the mortgage-bond presented it as a claim against the estate; and the surrogate directed the executors to pay it out of the personal property in their hands. But the Court of Appeals held that such a payment would defeat the obvious intent of the testator to have all his real and personal estate in this country divided equally among the beneficiaries under his will; and that the doctrine of two funds would be applied by requiring the bond-creditor to exhaust his remedy under his mortgage against the real estate before resorting to the personal property, which alone was available to the claimants under the will.¹ When a court of equity has control of both the real and the personal estate, it will, in order to save expense and delay, apply them in the order in which, as between the heir and the executor, they are liable.² So, where a testator devised all his estate both real and personal to his wife for her life, with remainder over, and directed his executrix to pay his debts as soon as possible out of any funds which she might obtain for that purpose, it was held that the tenant for life and the remainder-man must contribute for the payment of debts according to their respective interests, and that advances made by the tenant for life for that purpose constituted a lien upon the estate as against the remainder-man.³ The same rule has been applied in Massachusetts⁴ and in Maryland.⁵

§ 208. **Subrogation in Favor of Legatees.** — A legatee will be allowed the same right of subrogation as would be enjoyed by a creditor. If the personal estate of a testator, not being sufficient to pay debts and legacies, has been exhausted by the

¹ *Rice v. Harbeson*, 63 N. Y. 195; *Watts v. Watts*, 2 McCord Ch. 493. (So. Car.) 77.

² *Goodburn v. Stevens*, 1 Md. Ch. Dec. 420. ⁴ *Amory v. Lowell*, 1 Allen (Mass.), 504.

³ *Peck v. Glass*, 6 How. (Miss) ⁵ *Durham v. Rhodes*, 23 Md. 233.

executor in the payment of creditors whose debts are chargeable on both the real and the personal estate. A legatee, as between himself and the heirs, is entitled to stand in the place of the creditors *pro tanto*, and to receive the amount of his legacy, or so much thereof as the personal estate but for such creditors would have paid, out of the real estate descended to the heir, unless it appears by the will that the testator intended the legacy to abate in the case of a deficiency in the personal property.¹ Where a testator, having agreed to purchase an estate, died, leaving the greater part of the purchase-money unpaid, a legatee was allowed to have the assets marshalled in respect of the vendor's lien for the unpaid purchase-money, so that his legacy might be paid.² And if such purchase-money has been paid by the executor, and the personal assets of the estate have thereby been exhausted, a pecuniary legatee will be subrogated to the vendor's lien upon the purchased estate against the devisees thereof.³ Where a debt of the testator is primarily chargeable upon lands which he has specifically devised, and the creditor obtains his payment out of the personal estate, or from other property which is only secondarily liable for the debt, the owners of such personal estate or other property are entitled to be subrogated to the rights of the creditor against the estate specifically devised. And to prevent circuitry of action, the court permits and sometimes requires the creditor who can hold two funds for the satisfaction of his demand to proceed at once against that fund which is primarily liable, without subjecting the owners of the secondary fund to useless litigation.⁴

§ 209. **In Favor of a Purchaser from the Personal Representative.** — The purchaser of a deceased person's real estate at an invalid sale made thereof by the personal representative for the payment of debts, having paid his purchase-money, and this having been applied to the payment of debts and charges

¹ Mollan v. Griffith, 3 Paige (N.Y.), 402.

² Lilford v. Keck, L. R. 1 Eq. 347.

³ Sproul v. Prior, 8 Sim. 189.

⁴ Smith v. Wyckoff, 11 Paige (N.Y.), 49; *antea*, § 61.

of administration, is entitled, upon a disaffirmance of the sale, to be subrogated to the rights of the creditors and of the personal representative whom he has satisfied, and to charge the land with the debts and expenses so paid by him,¹ to the extent to which the land is liable for such debts and expenses.² This right of a purchaser has already been considered.³ Though a purchaser of land of a testator at a sale thereof made under a judgment against the executor acquires no title by his purchase, yet, if he pays his purchase-money under the belief that he is acquiring a good title, and this is applied to the payment of the judgment-debt, which was charged upon the land by the will, he will be subrogated to the benefit of this charge, and will be allowed to hold the land until he has been reimbursed to this extent.⁴ But the mere fact that the purchase-money has been applied to the payment of the debts of the deceased will not entitle the purchaser of his real estate from the administrator to a lien upon the land for his reimbursement upon the sale being set aside, if such debts do not appear to have been a charge upon the land.⁵

§ 210. **Where Legatees have paid Judgments against the Estate.**—Where legatees have paid a judgment rendered in favor of a creditor of the estate against the executor, such legatees have for their reimbursement the right to be subrogated to the remedies of the judgment-creditor; but it will be otherwise if the claim of the creditor has not been reduced to a judgment, or otherwise made a lien upon the assets to which the legatees are entitled to look;⁶ for one who pays a debt for which he was not personally liable, and which was not a charge upon his property, has no right to be substituted to the benefit of a lien which the creditor had upon the estate of his debtor.⁷ So where an executor, who was also a devisee and

¹ *Hudgins v. Hudgins*, 6 Gratt. (Va.) 320.

² *Springs v. Harven*, 3 Jones Eq. (Nor. Car.) 96.

³ *Antea*, § 30 *et seq.*

⁴ *McGee v. Wallis*, 57 Miss. 638.

⁵ *Bennett v. Coldwell*, 8 Baxter (Tenn.), 483.

⁶ *Mitchell v. Mitchell*, 8 Humph. (Tenn.) 359.

⁷ *Postea*, Ch. VIII.

legatee, died insolvent, having wasted a large portion of the estate, and leaving unpaid a debt of the testator and also a judgment against himself in no way connected with the estate, which judgment was a lien upon his interest as devisee in certain real estate of the testator, it was held that his co-devisees and legatees did not, by paying the debt of the testator, acquire a right over his interest in the real estate prior to the lien of his judgment-creditor, either by substitution to the claim of the creditor whom they had paid or by reason of the executor's waste.¹ But if a testator has bequeathed all his property to his widow in lieu of her dower, and she has as his executrix paid from the general assets notes given by him for the purchase-money of an estate which he had bought subsequently to the execution of his will, and which did not pass thereby, she will be subrogated for her reimbursement to a lien retained by the vendor upon the estate to secure to him the payment of these notes; and this right will pass to her devisee.²

§ 211. **Subrogation in Favor of Specific Devisees and Legatees.**

— The devisee of a tract of land which by direction of the testator had been levied upon in his lifetime to satisfy a debt of his own, and was still bound by the levy at the time of his death, having paid the debt, is entitled to be subrogated to the claim of the creditor against the personal assets of the estate;³ for, unless the will manifests a clear intention to the contrary,⁴ it is the right of such devisee to have the testator's indebtedness paid out of the personal and undisposed-of assets of the estate,⁵ though this rule is reversed when devised property is subject to a charge which is not the proper debt of the testa-

¹ *Wilkes v. Harper*, 1 N. Y. 586. *Plimpton v. Fuller*, 11 Allen (Mass.),

² *Durham v. Rhodes*, 23 Md. 233. 139; *Hewes v. Dehon*, 3 Gray (Mass.),

³ *Redmond v. Burroughs*, 63 Nor. 205; *Adams v. Brackett*, 5 Met. (Mass.) 280; *Hays v. Jackson*, 6

⁴ *Rogers v. Rogers*, 1 Paige (N. Y.), Mass. 149; *Lamport v. Beeman*, 34 188; *Brant's Will*, 40 Mo. 266; Barb. (N. Y.) 239; *Keene v. Munn*, 16 N. J. Eq. 398; *Lennig's Estate*, 52 Penn. St. 135; *Phinney's Estate*, 695.

⁵ *Gould v. Winthrop*, 5 R. I. 319; *Myrick's Prob.* (Calif.) 239.

tor.¹ But this right will not extend to a grantee of the devisee whose grant is expressly made subject to the incumbrance upon the land.² And in New York real estate which is subject to a specific lien for the payment of a debt, as in the case of a mortgage, is *primâ facie* the primary fund for the payment of such debt, to the exoneration of the personal property;³ and the same rule is adopted in England.⁴ Since specific legatees are entitled to receive their bequests exonerated from incumbrances created by the testator,⁵ they have likewise, if their legacies have been sold for the payment of the testator's debts, the right to resort to the general fund for their remuneration, upon the principles adopted in the marshalling of assets. If this general fund is made up partly of personal estate and partly of the proceeds of real estate not chargeable with the payment of simple-contract debts, that portion of it which comes from the personalty is liable in the first instance to make up for the loss of the specific legacies; and if that be insufficient, then the proceeds of the real estate are to be applied for the same purpose, so far, and so far only, as the specific legacies have been appropriated for the payment of specialty-debts which bound the real estate.⁶

§ 212. **Subrogation of Devisees to subsequently acquired Assets.** — Devisees who have lost the whole or part of the property devised to them by its being sold to pay the debts of the testator, in consequence of the insufficiency of the personal assets, will be subrogated to the rights of the creditors whom their property has thus satisfied, and entitled to reimbursement out of personal property subsequently discovered and received by the executors;⁷ and this right of subrogation of

¹ Gould v. Winthrop, 5 R. I. 319; Andrews v. Bishop, 5 Allen (Mass.), 490.

² Keene v. Munn, 16 N. J. Eq. 398.

³ 1 N. Y. Rev. Stats. 749; Mosely v. Marshall, 27 Barb. (N. Y.) 42; Jumel v. Jumel, 7 Paige (N. Y.), 590; Rogers v. Rogers, 1 Paige (N. Y.), 188; Cumberland v. Coddington, 3 Johns. Ch. (N. Y.) 229.

⁴ Woolstencroft v. Woolstencroft, 2 De G., F. & J. 347; Brownson v. Lawrence, L. R. 6 Eq. 1; St. 17 & 18 Vic., ch. 113.

⁵ Johnson v. Goss, 128 Mass. 433; Richardson v. Hall, 124 Mass. 228.

⁶ Byrd v. Byrd, 2 Brock. C. C. 169.

⁷ Couch v. Delaplaine, 2 N. Y. 397; Graham v. Dickiusion, 3 Barb. Ch. (N. Y.) 169.

such a devisee will pass by an assignment of all his share and claim in and to the personal estate of the testator which then was in or might thereafter come into the hands of the executors, although not mentioned in the assignment, and not appearing to be then known to the assignor.¹ Accordingly, where a testator charged his personal estate with the payment of his debts, but, this being insufficient for that purpose, his executors under an order of court sold the testator's real estate, which had been devised, and from the proceeds thereof paid his debts, and afterwards commissioners under a treaty with France awarded to the executors a sum of money upon a claim which the testator had against the French government, it was held that this money was in equity to be considered a substitute for the real estate which had been sold for the payment of debts that were primarily chargeable upon the personal estate, and that in equity it belonged exclusively to the devisees or their grantees, who were at the time of the sale the owners of the real estate that had been so sold, not as real estate, but as a fund to which they had an equitable right to compensate them for the loss of their land.²

§ 213. **Rights of Heirs, Devisees, or Legatees against each other.** — If one of several devisees has lost the property devised to him by its being taken to pay a debt of the testator, he will be so far subrogated to the rights of the creditors whom he has thus been forced to satisfy, as to be entitled to a contribution to his loss from the other devisees;³ and an heir will have the same right against the other heirs.⁴ The different devisees, if there be a deficiency of assets, must contribute, to meet a charge upon all the estate devised, in proportion to the value of their respective interests, as to make up an annuity to the

¹ Couch v. Delaplaine, *supra*.

² Graham v. Dickinson, *supra*.

³ Rhoads's Estate, 3 Rawle (Penn.), 420; Brigden v. Cheever, 10 Mass. 450; Armistead v. Dangerfield, 3 Munf. (Va.) 20; Foster v. Crenshaw,

3 Munf. (Va.) 514; Humphries v. Shaw, 63 Nor. Car. 341; Lancefield v. Iggulden, L. R. 10 Ch. 136.

⁴ Taylor v. Taylor, 8 B. Mon. (Ky.) 419; Tilghman, C. J., in Guier v. Kelly, 2 Binney (Penn.), 294, 299.

testator's widow, or to pay debts of the testator, which remain unsatisfied after the personal property and the undivided real estate have been exhausted.¹ If the estate of a devisee has been taken for the dower of the testator's widow, his right to contribution is the same as if it had been taken for a debt of the testator.² A legatee who has advanced money to pay the testator's debts under the mistaken supposition that they were charged upon his property may maintain a bill to obtain contribution from his co-legatees.³ Where legacies and devises are put upon an equality, they are equally liable to contribution among themselves.⁴ But a residuary devisee is not entitled to contribution from the other devisees,⁵ though a different rule has been laid down in England.⁶ A devisee of land who has been obliged to pay a debt of the testator which was primarily charged upon the land devised to him cannot claim contribution therefor from other specific devisees or legatees.⁷ In Mississippi it is said that the doctrine of the marshalling of assets does not apply to the case of specific legatees under a will when all the property bequeathed to them is subject to an incumbrance paramount to the will of the testator, and the property bequeathed to one of them has alone been seized to satisfy this incumbrance; and accordingly such a specific legatee will have no right to enforce contribution from his co-legatees, though their property was equally liable with his to the burden of the incumbrance,⁸ thus leaving it to the caprice of the creditor to determine at whose expense he shall get his payment.⁹ And in Indiana, on the principle that no one can enjoy, by way of subrogation to a creditor, any

¹ *Livingston v. Livingston*, 3 Johns. Ch. (N. Y.) 148.

² *Blaney v. Blaney*, 1 Cush. (Mass.) 107.

³ *McC Campbell v. McC Campbell*, 5 Litt. (Ky.) 92.

⁴ *Powell v. Riley*, L. R. 12 Eq. 175; *Grim's Appeal*, 89 Penn. St. 333; *Brant's Will*, 40 Mo. 266.

⁵ *Blaney v. Blaney*, 1 Cush. (Mass.)

107; *McMullin v. Brown*, 2 Hill Eq. (So. Car.) 457.

⁶ *Lancefield v. Iggulden*, L. R. 10 Ch. 136. See *Spong v. Spong*, 3 Bligh, N. S. 84; *Hensman v. Freyer*, L. R. 3 Ch. 420; S. C. L. R. 2 Eq. 627.

⁷ *Hocker's Appeal*, 4 Penn. St. 497.

⁸ *Peeples v. Horton*, 39 Miss. 406.

⁹ *Antea*, § 172 *et seq.*

greater rights than the creditor himself possessed, it has been held that where one died, leaving unincumbered real estate and also real estate subject to a mortgage by the terms of which the mortgagee would look only to the land for the satisfaction of his demand, and the mortgagor's heirs made partition among themselves of all his land in ignorance of the mortgage, the heir who afterwards lost his land by the mortgagee's taking it could not be indemnified for his loss from the personal estate of the deceased.¹ Nor can a devisee who has lost his estate for lack of title in the testator be relieved out of other portions of the testator's property.²

§ 214. **Specific Devise or Legacy chargeable with Expense incurred for its Protection.**—An executor who has properly paid out of the general estate taxes and street assessments upon certain parcels of land specifically devised by the testator is entitled to reimbursement from the devisees thereof; and in case of their failure to reimburse him he may be subrogated to the lien upon the land which existed in behalf of the taxes and assessments, and may have this lien enforced for his protection.³ Though co-legatees do not sustain to each other the relation of co-sureties for the testator's debts, each being responsible in any event only in proportion to the amount of his own legacy,⁴ yet, if one of two residuary legatees has incurred in protecting their joint interest an expense which has proved to be beneficial to both of them, he will be entitled to recover from his co-legatee reimbursement to the amount of the expense incurred upon the latter's account.⁵

§ 215. **Rights of Heirs among themselves.**—If some of the heirs of an intestate held a mortgage upon his real estate to secure the payment of a debt due to them from him, and in order to prevent a sale of his real estate by his administratrix

¹ *Fairman v. Heath*, 19 Ind. 63. *Mogan's Estate*, Myrick's Prob.

² *McKinnon v. Thompson*, 3 Johns. (Calif.) 80.

³ *Ch. (N. Y.) 307.* ⁴ *Wilkes v. Harper*, 1 N. Y. 586.

⁵ *Hudson v. Gray*, 58 Miss. 882; ⁵ *New Orleans v. Baltimore*, 15 La. Ann. 625.

give bond for the payment of his debts, they will thereby discharge the lien of their mortgage as a security for the debt due to themselves ;¹ but they will nevertheless be entitled to hold the mortgaged premises against the other heirs as if the mortgage still subsisted, until these other heirs shall contribute their respective shares of the mortgage-debt.² An heir-at-law who has paid debts and funeral expenses out of his own pocket as a matter of bounty will not afterwards be subrogated to the rights of the creditors against the personal estate.³

§ 216. **Rights of Purchaser from Heir or Devisee.** — If the purchaser from an heir-at-law of a portion of the real estate descended to the latter subsequently loses the land which he has purchased, by its being sold to pay the debts of the ancestor, such purchaser will have an equitable lien upon the residue of the property remaining in the hands of the heir for his reimbursement :⁴ such a purchaser, as to the land remaining in the possession of the heir, stands in the position of a surety, and will be subrogated to the rights of the creditor whom his property has satisfied, as if he were a surety.⁵ And if successive conveyances of lands have been made by an heir, or by a devisee thereof charged with the payment of debts or legacies, the lands thus conveyed are, in the hands of the purchasers thereof, liable among themselves to be resorted to for the payment of such debts or legacies in the inverse order of their alienation, the portion, if any, remaining in the hands of such heir or devisee being first taken, then the portion last conveyed by him, and so on.⁶ In the same way *bonâ fide* purchasers of the property of the testator from executors who have power to sell the same will be protected from debts of the testator which are liens upon the purchased property, by

¹ Robinson v. Leavitt, 7 N. H. 73. (N. Y.), 47 ; Livingston v. Freeland,

² Jenness v. Robinson, 10 N. H. 215. 3 Barb. Ch. (N. Y.) 510 ; Conover v.

³ Coleby v. Coleby, L. R. 2 Eq. 803. Conover, 1 N. J. Eq. (Saxton) 403 ;

⁴ Eddy v. Traver, 6 Paige (N. Y.), Lewis v. Overby, 31 Gratt. (Va.) 601 ;
521. Nellons v. Trnax, 6 Ohio St. 97 ; Finch

⁵ Eddy v. Traver, *supra*. v. Shaw, 19 Beav. 500 ; *antea*, § 75

⁶ Jenkins v. Freyer, 4 Paige *et seq.*

compelling the executors, if they have assets, to pay such debts.¹

§ 217. **Creditors subrogated to the Rights of Legatees.**— If a testator charges one tract of land with the payment of his debts, and another tract with the payment of legacies, and the legacies are paid out of the proceeds of the former tract, the creditors will be subrogated to the rights of the legatees against the latter tract, in the hands of a purchaser thereof who had constructive notice of the terms of the will; and sureties who have satisfied the creditors will have the same right which the creditors might have exercised.² “The legatees,” said *Moncure, P.*,³ “having received payment out of the fund which belonged to the creditors, the latter had a clear and plain right to compel the former to refund the money, so far as it was necessary for the payment of debts. And the legatees, being thus disappointed in obtaining satisfaction out of the fund which belonged to the creditors, would have as clear and plain a right to be reinstated in their charge upon the home place, and to be satisfied out of the same. But to avoid circuitry, a court of equity will subrogate the creditors to the place of the legatees, and give the former a direct decree against the home place. This is a simple process, daily pursued in courts of equity.”

§ 218. **Subrogation of Devisee or Legatee who is disappointed by the Election of another.**— Beneficiaries under a will who have, by the election of another legatee, been disappointed of what they would otherwise have received, will be allowed compensation for their loss out of what the latter would by a different election have taken under the will.⁴ If a legatee under a will which devises away property belonging to himself

¹ *Latrobe v. Tierman*, 2 Md. Ch. 163; *Wilkinson v. Dent*, L. R. 6 Ch. Dec. 474. 339, 341; *Rceve v. Reeve*, 1 Vern.

² *Burwell v. Fauber*, 21 Gratt. 219; *Welby v. Welby*, 2 Ves. & B. (Va.) 446. 187, 190; *Bor v. Bor*, 3 Bro. P. C.

³ In *Burwell v. Fauber*, *supra*. 167; *Dean v. Hart*, 62 Ala. 308; *Key*

⁴ *Pickersgill v. Rudger*, 5 Ch. Div. *v. Griffin*, 1 Rich. Eq. (So. Car.) 67.

elects to retain his own property and to waive the legacy, the testator will not be thereby rendered intestate, or the share of the residuary legatees, not being the parties disappointed in consequence of the election, increased, as to the subject-matter of such legacy, but it will go to the disappointed devisee, so far as is necessary to the satisfaction of his loss.¹ So, if a testator bequeaths the income of certain property to his wife for the support of herself and her children, and she waives the provisions of the will in her behalf and elects to take her dower-rights instead thereof, the children will be entitled to the whole of the income of that property for the time that she would otherwise have taken it.² The ground of this doctrine was stated in an early case to be that where a testator, in making provision for the different branches of his family, gives a fee-simple estate to one, and a settled estate to another, imagining that he had power to do so, a tacit condition is understood to be annexed to the devise of the fee-simple estate that the devisee thereof shall permit the settled estate to go according to the terms of the will; and if in that respect he should disappoint the will, what is devised to him will go to the person who is thereby disappointed, it being presumed that, if the testator had known of his lack of power to devise the settled estate, he would out of the estate in his power have provided for that branch of his family which had no interest in the settled estate, and have directed that no person should enjoy a devise or legacy who controverted his power as to a bequest given to another.³

§ 219. **Extent of this Right of Substitution.**—The substitution of the disappointed beneficiaries to the rights of the legatee or devisee whose election has caused the disappointment will, if necessary, be to the extent of the rights which were

¹ *Ker v. Wauchope*, 1 Bligh, 1; *Lewis v. Lewis*, 13 Penn. St. 79; *Plympton v. Plympton*, 6 Allen (Mass.), 178. *Contra*, *Hawley v. Kinnaird v. Williams*, 8 Leigh (Va.), 400; *Wilbanks v. Wilbanks*, 18 Ill. 17. *Contra*, *Hawley v. James*, 5 Paige (N. Y.), 318.

² *Plympton v. Plympton*, 6 Allen (Mass.), 178. *Contra*, *Hawley v. James*, 5 Paige (N. Y.), 318.

³ *Bor v. Bor*, 3 Bro. P. C. 167.

given by the will to the party making the election,¹ but it can be carried no further.² If the widow of a testator who has by his will, after various absolute devises and bequests, bequeathed the income of a certain fund to his wife for her life, and directed the principal after her death to be distributed among various legatees, and given the remainder of his estate to his residuary devisees, elects to take her statutory rights as widow in his estate instead of the provision made for her in his will, and thus diminishes the share of the residuary legatees, these legatees will, during the lifetime of the widow, by substitution to her rights, be entitled to receive the income of the fund provided for her, and after her death the fund will go to the legatees named in the will, in like manner as if her election had operated no change in carrying out the intentions of the testator.³ The purchaser from a devisee of certain cottages in which the testator had only a life-estate, the remainder being in his wife, will be entitled to compensation from the estate of the testator's wife, for her selling the cottages, to the extent of the benefit taken by the wife under the will, the testator having given all his estate to his wife for her life, and these cottages after her death to such purchaser's grantor.⁴ A testator, having charged certain lands with a portion for his daughter by his first wife, afterwards settled a portion of the same lands as a jointure upon his second wife, who had no notice of the prior charge. Believing that the charge would have preference over the jointure, he then devised other lands to his wife, in lieu of the jointure. After his death, the wife, finding that her jointure was good against the charge for the daughter's portion, because the latter was merely voluntary, agreed with the heir to waive her devise, and claim the jointure, for the purpose of depriving the daughter of her portion. But the court

¹ *Rogers v. Jones*, 3 Ch. Div. 314; *Stump v. Findlay*, 2 Rawle 688. (Penn.), 168.

² *Gretton v. Haward*, 1 Swanst. 409; *Upham v. Emerson*, 118 Mass. 468.

³ *Firth v. Denny*, 2 Allen (Mass.), 468.

⁴ *Rogers v. Jones*, 3 Ch. Div. 688.

decreed that the daughter should have the lands devised to the wife, until her portion was made up.¹

§ 220. **This does not extend to a Devise merely upon Condition.** — If property is devised to one upon a condition with which he fails to comply, and thus waives his right to the devise, the performance of this condition by a stranger will not substitute the stranger to the rights of the devisee.² Thus, where a testator devised land to one of his sons on condition that the devisee should support a second son during his life, but the devisee refused to accept the devise and did not support the second son, and a stranger, having been appointed guardian of the latter, advanced out of his own means money for his support, to an amount equal to the value of the estate so devised, it was held that the guardian could not rightfully claim to be reimbursed for these advances out of the devised estate, but that, on the refusal of the original devisee to accept the same, it descended to the testator's heirs-at-law, free of any charge thereon;³ but in Vermont the right of a party furnishing support to the beneficiary of such a conditional devise to be subrogated to the title of the devisee has been affirmed.⁴ If a person to whom land is devised, on condition of his releasing a debt due to him from the testator, receives payment of the debt, he relinquishes the land; and the fact that he receives such payment from a stranger gives the latter no title to the land.⁵ But if the money so paid by such stranger was the full value of the property, and immediately upon its payment he took possession of the land, and was suffered by all the heirs to hold possession, they knowing and acquiescing in his payment, and he incurred expense to make improvements, it has been inti-

¹ *Reeve v. Reeve*, 2 Vern. 119, recognized by *Lord Hardwicke*, in *Lanoy v. Athol*, 2 Atk. 447.

² *Temple v. Nelson*, 4 Met. (Mass.) 584; *Frederick v. Gray*, 10 Serg. & R. (Penn.) 182; *Bughee v. Sargent*, 23 Maine, 269; *Box v. Barrett*, L. R. 3 Eq. 244.

³ *Temple v. Nelson*, *supra*.

⁴ *Ferre v. American Board*, 53 Vt. 162.

⁵ *Frederick v. Gray*, *supra*. See also *King v. Morris*, 2 B. Mon. (Ky.) 99.

mated that equity would order the land to be conveyed to him, especially if the title was one which was then governed as to its transmission by the same rules as personal property.¹ And a devise of land on condition that the devisee shall pay certain specified debts and legacies creates a charge upon the land, to the exoneration of the personal property bequeathed by the will, although the devise be not accepted.²

¹ *Frederick v. Gray, supra.*

² *McFait's Appeal*, 8 Penn. St. 290.

CHAPTER VII.

SUBROGATION UNDER CONTRACTS OF INSURANCE.

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§ 221. **Subrogation of Marine Insurers.**— Marine insurers acquire by the abandonment to them of the property insured and by the satisfaction of their policies all the ownership of the insured in the property abandoned,¹ with the *spes recuperandi*, and all the rights and remedies of the insured with respect thereto, and may prosecute these rights and remedies in their own names.² “The law gives to the act of abandonment, when accepted, all the effects which the most carefully drawn assignment would accomplish. By the act of abandonment the insured renounces and yields up to the underwriter all his right, title, and claims to what may be saved, and leaves it to

¹ The *Mary E. Perew*, 15 Blatchf. Hall, 104 Mass. 507; *Union Ins. Co. v. C. C.* 58; *Traders' Ins. Co. v. Pro-* *v. Burrell*, Anth. Cas. (N. Y.) 128; *peller Manistee*, 5 Biss. C. C. 381. *United Ins. Co. v. Scott*, 1 Johns.

² *Mutual Ins. Co. v. Brig George*, N. Y. 106.
Olcott (Adm.), 89; *Sun Ins. Co. v.*

him to make the most of it for his own benefit. The underwriter then stands in the place of the insured, and becomes legally entitled to all that can be saved from destruction.”¹ The insurers are entitled, upon settlement as for a total loss, to be subrogated for their own benefit to any rights of action of the insured against a third party for his negligence or wrong-doing causing the loss.² The abandonment has a retro-active effect, and vests in the insurers the title to the property or its proceeds from the time of the injury or loss as fully as if it had been the subject of a bill of sale.³ The property vests in the insurers, with its benefits as well as its burdens,⁴ if the abandonment has been rightfully made, though the loss has not been actually paid.⁵

§ 222. **Subrogation to the Remedy for a Tort causing the Loss.**

—Accordingly the right of a ship-owner to indemnity for an unjust capture will pass by his abandonment to the insurers of the ship,⁶ and on the latter's bankruptcy will vest in their assignees.⁷ The insurers of a ship which has been run down and sunk by the fault of another ship are, upon their payment of a total loss, subrogated to the right of the insured to recover therefor against the owners of the latter vessel, and will be entitled to any damages which the insured may have recovered from such owners; and if their policy was a valued one, their payment of this value will give to them the whole *spes recuperandi* and the right to the whole damages, though the insured vessel was in fact worth a larger sum than the valuation named in the policy, this valuation being conclusive

¹ *Story, J.*, in *Comegys v. Vasse*, 1 Peters, 193; *Simonds v. Union Ins. Co.*, 1 Wash. C. C. 443. *Cas. (N. Y.)* 128; *Union Ins. Co. v. Scott*, 1 Johns. (N. Y.) 106.

² *Home Ins. Co. v. Western Transportation Co.*, 4 Robt. (N. Y.) 257; *Mercantile Ins. Co. v. Clark*, 118 Mass. 288; *North of England Ins. Association v. Armstrong*, L. R. 5 Q. B. 244. ⁴ *Frothingham v. Prince*, 3 Mass. 563; *Sun Ins. Co. v. Hall*, 104 Mass. 507.

³ *Rogers v. Hosack*, 18 Wend. (N. Y.) 319.

⁵ *Monticello v. Mollison*, 17 Howard, 152.

⁶ *Sun Ins. Co. v. Hall*, 104 Mass. 507; *Union Ins. Co. v. Burrell*, Anth. 193. ⁷ *Comegys v. Vasse*, 1 Peters,

between the insurers and the insured.¹ Accordingly, the defendants in an action to recover for the damage done to the plaintiff's ship by a collision cannot deduct from the damages to be paid by them the amount that has been paid to the plaintiff for the same injury by insurers of the ship; the plaintiff is entitled to recover as to this amount as a trustee for the insurers.² So, too, if the insurers of goods have stipulated to answer for a loss by theft, and the master and ship-owners are also liable for this loss, the insurers, upon a loss by theft and an abandonment to them or their payment of a total loss, will be entitled to be subrogated to the remedy of the insured therefor against the master and ship-owners; and if the insured destroys this remedy after his recovery of judgment against the insurers, equity will relieve the latter *pro tanto* from this judgment.³ And as the master or ship-owners would have no right to claim from the owners of the goods contribution for such a loss, the policy cannot, upon their satisfying the insured, be legally assigned for their benefit, so as to enable them to recover from the insurers.⁴ Insurers will, upon satisfying a judgment recovered against them for the total loss of a vessel occasioned by the barratry of its master, be subrogated to the benefit of a judgment obtained by the insured against the master for the same loss, although they have, while the action against the master was pending, refused an offer of the insured to transfer the control of that action to them, upon condition that they should pay the expenses already incurred therein, and that the transfer should not prejudice any rights of the insured.⁵

§ 223. **Limitations of this Subrogation.**—This subrogation of the insurers to the remedy against a wrong-doer who has caused the loss which the insurers have satisfied is only to

¹ North of England Ins. Association v. Armstrong, L. R. 5 Q. B. 244.

² Atlantic Ins. Co. v. Storow, 5 Paige (N. Y.), 285.

³ Atlantic Ins. Co. v. Storow, *supra*.

⁴ Yates v. White, 4 Bing. New Cas. 272, following Mason v. Sainsbury, 3 Dong. 61.

⁵ Mercantile Ins. Co. v. Clark, 118 Mass. 288.

the remedies and rights of action which were vested in the insured; it is not an independent right of action in the insurers themselves.¹ The insurer merely succeeds to the means of redress which were possessed by the party whom he has indemnified against the party whose wrongful act caused the loss.² Accordingly, where two ships belonging to the same owner came into collision, and one of them sank and became a total loss, the insurers of the latter ship did not, upon their payment of a total loss, become entitled to make any claim for the loss against the insured as the owner of the ship at fault in the collision; for their right existed only through the owner of the ship insured, and not independently of him; and as he could not have sued himself, they would have no remedy against him.³

§ 224. **Does not arise upon a Compromise of the Insurer's Liability.**—If the insurers do not accept an abandonment of the insured property, or pay a total loss, but make a compromise of the claim upon them, they will not be subrogated to the rights of action of the insured for the wrongful act which caused the loss, or entitled to whatever compensation may afterwards be realized therefor.⁴ Thus, where a cargo of merchandise which was insured was seized and condemned by the French government under the Berlin and Milan decrees, and a compromise was afterwards made between the underwriters and the insured, whereby the latter accepted from the former one-third of their claim under the policy, and surrendered the policy, but did not cede or assign to the underwriters their claim to indemnity from the French government, it was held, on the underwriters subsequently receiving the amount of their payment under the convention between the American and the French governments providing for indemnity for

¹ *Alliance Ins. Co. v. Louisiana Ins. Co.* 8 La. 1.

² *Conn. Ins. Co. v. N. Y. & N. H. R. R. Co.*, 25 Conn. 265.

³ *Simpson v. Thomson*, 3 App. Cas. 279.

⁴ *Brooks v. McDonnell*, 1 Yo. & Co. Ex. 500; *New York Ins. Co. v. Roulet*, 24 Wend. (N. Y.) 505.

spoliations upon our commerce, that they received this money in trust for the insured, and must pay it over to them.¹ And if, under such circumstances, the insured should, after their compromise with the underwriters, receive full compensation for their loss from the parties at fault therefor, the underwriters would not be entitled to any part of this compensation.²

§ 225. **Effect of an Abandonment.** — After an abandonment, if it is a legal one, or if it is accepted, the insurers stand in the place of the insured, and the former agents of the insured become the agents of the insurers.³ The master of the ship becomes the agent or servant of the insurers, and is answerable to them for his neglect or misconduct.⁴ The consignee of goods insured becomes by the abandonment the agent of the insurers; and his acts done in good faith are at their risk and for their benefit.⁵ An agent appointed by the insured after a capture to prosecute his claim becomes, after an abandonment, the agent of the insurers; and the receipt by such agent of the money for which such property has been sold will be deemed to be a receipt thereof by the insurers, who must look to the agent for the amount, and pay to the insured the full amount of the loss, without any deduction therefor.⁶ The wages of the crew, after an abandonment, will be chargeable to the insurers, not as insurers, but as owners of the ship.⁷ And the insurers, as owners of the ship, will be entitled to its earnings, if any

¹ *New York Ins. Co. v. Roulet*, 24 Wend. (N. Y.) 505.

² *Brooks v. McDonnell*, 1 Yo. & Co., Ex. 500.

³ *Chesapeake Ins. Co. v. Stark*, 6 Cranch, 268; *Hurtin v. Phoenix Ins. Co.*, 1 Wash. C. C. 400; *Mutual Ins. Co. v. Cargo*, Olcott, Adm. 89; *Peirce v. Ocean Ins. Co.*, 18 Pick. (Mass.) 83; *Badger v. Ocean Ins. Co.*, 23 Pick. (Mass.) 347; *Gardiner v. Smith*, 1 Johns. Cas. (N. Y.) 141; *Curcier v. Phila. Ins. Co.*, 5 Serg. & R. (Penn.) 113; *Cincinnati Ins. Co. v. Duffield*,

6 Ohio St. 200; *Norton v. Lexington Ins. Co.*, 16 Ills. 235; *Gould v. Citizens' Ins. Co.*, 13 Mo. 524; *Phillips v. St. Louis Ins. Co.*, 11 La. Ann. 459; *Graham v. Ledda*, 17 La. Ann. 45.

⁴ *Gardere v. Columbian Ins. Co.*, 7 Johns. (N. Y.) 514.

⁵ *Gardiner v. Smith*, 1 Johns. Cas. (N. Y.) 141.

⁶ *Miller v. De Peyster*, 2 Caines (N. Y.), 301.

⁷ *McBride v. Marine Ins. Co.*, 7 Johns. (N. Y.) 431.

are made after the abandonment.¹ But since the earnings of the ship up to the time of the abandonment belong to the insured as its owner,² if the owner of ship and goods rightfully abandons both to the underwriters as for a total loss by perils insured against, and part of the goods are saved, the insurers as owners of the goods will be liable to the insured as owners of the ship for freight *pro ratâ itineris* until the abandonment.³ The freight earned before and after the abandonment will be apportioned, so as to give to each party, the insured and the insurers, the earnings of the ship, during the respective periods of their ownership thereof.⁴

§ 226. **Abandonment of Ship and Freight separately insured.**

— If the owner of a ship has effected separate insurances upon ship and freight, and afterwards rightfully abandons both to the underwriters upon them respectively, the doctrine generally adopted in this country is that he is entitled to recover for a total loss of both,⁵ and that the freight earned prior to the loss goes to the ship-owner, or to his representatives, the insurers of the freight, to whom it has been abandoned, while the freight, if any, earned subsequently to the loss which has caused the abandonment goes to the insurers of the ship, who have by the abandonment become its owners.⁶ Accordingly, if a ship-owner, having insured the ship and the freight separately with two sets of insurers, upon a capture of the ship abandons the ship to the insurers of the ship and the freight to the insurers of the freight, and then takes from the insurers of the ship half of his claim in cash, and for the other half an assignment of their interest in the ship, he will be entitled to the freight which would otherwise have been theirs, and may recover from the insurers of the freight to the full amount of

¹ *McBride v. Marine Ins. Co.*, 7 Johns. (N. Y.) 431; *Stewart v. Greenock Ins. Co.*, 2 Ho. Lds. 159; *Miller v. Woodfall*, 8 El. & Bl. 493.

² *Miller v. Woodfall*, 8 El. & Bl. 493.

³ *Teasdale v. Charleston Ins. Co.*, 2 Brev. (So. Car.) 190.

⁴ *Kennedy v. Baltimore Ins. Co.*, 3 Harris & J. (Md.) 367.

⁵ *Coolidge v. Gloucester Ins. Co.*, 15 Mass. 341.

⁶ *Marine Ins. Co. v. United Ins. Co.*, 9 Johns. (N. Y.) 186; *Davy v. Hallett*, 3 Caines (N. Y.), 16.

their policy, deducting only the *pro rata* freight which had been earned before the abandonment.¹

§ 227. **English Doctrine.**—In England, as in the United States, freight earned subsequently to the loss by reason of which the abandonment is made goes to the insured as owner of the ship.² If, after the disaster and abandonment, the cargo is transshipped and carried by another vessel to the port of destination, and the freight is thus earned, this will not be for the benefit of the insurers of the ship.³ But if, after the loss which is the cause of the abandonment, the original ship proceeds on her voyage, and earns the pending freight, both the vessel and the freight being separately insured, the title to the whole freight is vested by the abandonment in the insurers of the ship;⁴ and, the freight having been earned in accordance with the true interpretation of the policy upon the freight, and having been prevented from coming to the insured only by reason of his voluntary abandonment of the ship, the insured cannot recover anything in an action upon the latter policy.⁵ The abandonment produces the same results upon the title to the freight as would follow from any other transfer of the ship.⁶

§ 228. **Subrogation of Insurers on Freight against the Insured.**—If, however, the rights of the insurers of the freight are not complicated by the effect of an abandonment of the ship to the insurers thereof, their right of subrogation, upon the abandonment to them of the insured subject, will, as against the insured, be the same as that of other marine insurers.⁷ And however the question of priority of title as to the freight-money

¹ *Davy v. Hallett*, 3 Caines (N. Y.), 16.

² *Luke v. Lyde*, 2 Burr. 882.

³ *Hickie v. Rodocanachi*, 4 Hurlst. & Nor. 455.

⁴ *Stewart v. Greenock Ins. Co.*, 2 Ho. Lds. 159; *Davidson v. Case*, 8 Price Exch. 542; S. C. 5 J. B. Moore, 116; S. C. in Exch. Chamber, 2 Brod. & B. 379.

⁵ *Scottish Ins. Co. v. Turner*, 4 Ho. Lds. 312; *McCarthy v. Abel*, 5 East, 388.

⁶ *Morrison v. Parsons*, 2 Taunt. 407; *Splidt v. Bowles*, 10 East, 279; *Chinnery v. Blackburn*, 1 H. Blackst. 117, *note*.

⁷ *Barclay v. Stirling*, 5 Mau. & S. 6.

might be held as between the two sets of insurers, and however the weight of argument might be taken to preponderate in favor of the underwriters upon the ship over those upon the freight, yet the title of the latter is superior to that of the insured claiming in his own right.¹

§ 229. **Subrogation against a Carrier of Insured Goods.** — As between a carrier of goods and an insurer of the same goods, the primary responsibility for their loss or destruction is upon the carrier, and the liability of the insurer is merely secondary, the owner and the insurer being considered as but one person, and having together the beneficial right to the indemnity due from the carrier for the breach of his contract or the non-performance of his duty.² “Standing, as the insurer does, practically in the position of a surety, stipulating that the goods shall not be destroyed or injured in consequence of the perils insured against, whenever he has indemnified the owner for the loss he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner. Hence it has been often ruled that an insurer who has paid a loss may use the name of the insured in an action to obtain redress from the carrier whose failure of duty caused the loss. It is conceded that this doctrine prevails in cases of marine insurance; but it is denied that it is applicable to cases of fire insurance upon land; and the reason for the supposed difference is said to be that the insurer in a marine policy becomes the owner of the lost or injured property by the abandonment of the insured, while in land policies there can be no abandonment. But it is a mistake to suppose that the right of insurers in marine policies to proceed against a carrier of goods after they have paid a total loss grows wholly or even principally out of any abandonment. There can

¹ *Thompson v. Rowcroft*, 4 East, 34; *Puller v. Staniforth*, 11 East, 232; *Leatham v. Terry*, 3 Bos. & P. 479. ² *Hall v. Nashville & Chatt. R. R. Co.*, 13 Wallace, 367; *Gales v. Hailman*, 11 Penn. St. 515.

be no abandonment where there has been total destruction; there is nothing upon which it can operate; and an insured party may recover for a total loss without it. It is laid down in Phillips on Insurance¹ that the payment of a loss, whether partial or total, gives the insurers an equitable title to what may afterwards be recovered from other parties on account of the loss, and that the effect of a payment of a loss is equivalent in this respect to that of an abandonment. There is then no reason for the subrogation of insurers by marine policies to the rights of action of the insured against a carrier by sea which does not exist in support of a like subrogation in cases of insurance against fire upon land. Nor do the authorities make any distinction between the cases.”² But the remedy of fire insurers against the carrier must be pursued in the name of the insured;³ and the carrier may make it unavailing to the future insurer by stipulating with the owner of the goods for the benefit of any insurance to be obtained by the owner against loss or damage to the goods for which the carrier would be liable.⁴

§ 230. **Insurer against Fire subrogated to Remedy against Railroad.**—The insurers against fire of property which has been destroyed by fire communicated from a locomotive engine will, upon payment for the loss, be subrogated, to the extent of their payment, to the remedies of the insured, as the owners of the property insured and destroyed, against the railroad company for the loss.⁵ But this remedy must also, like that against a carrier, be prosecuted at law in the name of the insured, since the right of action was already vested in the latter before the payment by the insurers,⁶ except under those reformed

¹ Section 1723.

⁴ *Mercantile Ins. Co. v. Calebs*, 20

² *Strong, J.*, in *Hall v. Nashville & Chatt. R. R. Co.*, 13 Wallace, 367.

N. Y. 173.

³ *Hall v. Nashville & Chatt. R. R. Co.*, *supra*; *Mercantile Ins. Co. v. Calebs*, 20 N. Y. 173; *Gails v. Hailman*, 11 Penn. St. 515; *Georgia Ins. Co. v. Dawson*, 2 Gill (Md.), 365.

⁵ *Hart v. Western R. R. Co.*, 13 Met. (Mass.) 99; *Conn. Ins. Co. v. Erie Railw. Co.*, 73 N. Y. 399; *Monmouth Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107.

⁶ *Swarthout v. Chicago R. R. Co.*,

codes of procedure which permit any action to be brought in the name of the real party in interest.¹ But since the subrogation of the insurers is only to the rights of the insured, and the action for a single tort is indivisible, a judgment against a railroad company for the destruction of one building by fire communicated from its locomotive engine will bar another action in the name of the same plaintiff against the same defendant for the destruction of another building by fire communicated from the first building, although the second action is really brought and prosecuted for the benefit of an insurance company which has, upon one of its policies, paid the plaintiff for the loss of the second building.² A release given by the nominal plaintiff pending the action will not be a bar to its further prosecution against the railroad company for the benefit of the insurance company.³ Insurers of a building which has been destroyed by fire through the fault of a railroad company may restrain the insured from collecting or settling their claim in a suit against the railroad company without subrogation of the insurers.⁴ If, before the payment by the insurance company of the amount due upon its policy, the owner of the property has received from the railroad company the amount of the loss above the insurance, and has given to the railroad company a discharge of its liability containing the statement that it was not intended thereby to release the insurance company from its liability to him, this will be treated as a limitation of the discharge to the amount of the loss over the insurance, retaining the claim upon the insurance company, and reserving its remedy over, and so not barring the

49 Wisc. 625; *Peoria Ins. Co. v. Frost*, 37 Ills. 333; *Hart v. Western R. R. Co.*, 13 Met. (Mass.) 99; *Ætna Ins. Co. v. Hannibal & St. Joseph R. R. Co.*, 3 Dillou C. C. 1.

¹ *Conn. Ins. Co. v. Erie Railw. Co.*, 73 N. Y. 399; *Swarthout v. Chicago & N. W. R. R. Co.*, 49 Wisc. 625.

² *Trask v. Hartford & N. H. R. R. Co.*, 2 Allen (Mass.), 331.

³ *Hart v. Western R. R. Co.*, 13 Met. (Mass.) 99; *Monmouth Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107.

⁴ *Hartford Ins. Co. v. Pennell*, 2 Ills. App. 609.

insurance company's right of subrogation against the railroad company.¹

§ 231. **Mode of enforcing this Right.** — This subject was fully discussed in New Jersey; and the doctrine was established, that where an insurance company pays the insured for a loss by fire occasioned by the fault of a railroad company, and the insured afterwards receives from the railroad company the amount in satisfaction of his damages, he holds this in trust for the insurers, and they may recover it from him by a suit in equity; and if the railroad company has not paid the insured his damages, or has paid them knowing that the insured has already received his payment from the insurance company, the latter may maintain a suit at law against the railroad company in the name of the insured, even against his consent, to compel repayment of the damages to the amount of their payment; and a release given by the insured to the railroad company would be no defence to this suit. But these two remedies cannot be pursued on a single bill in equity: neither the insured nor the railroad company is a necessary party to the suit against the other; they are not jointly liable, and no judgment could be rendered or decree made against both. The insurers may, however, before beginning their suit against the railroad company, bring a bill in equity to have a release given by the insured to the railroad company, when the latter knew of the payment by the insurers, declared void as a fraud upon their rights; and to this bill both the insured and the railroad company would be proper parties.²

§ 232. **Subrogation against other Parties liable for a Loss by Fire.** — In like manner the insurers of a building, which has been burned in such a manner as to create a liability therefor in a hundred or in a municipality or in other parties at fault, cannot, upon their payment of a loss, maintain an action therefor against the parties ultimately responsible for the loss in

¹ Conn. Ins. Co. v. Erie Railw. Co., 73 N. Y. 399; reversing S. C. 10 Hunson, 21 N. J. Eq. 107. (N. Y.), 59.

² Monmouth Ins. Co. v. Hutchin-

their own names,¹ but may do so in the names of the insured owners of the property, whom they have indemnified.² The payment by the insurers will be no defence in an action brought by the owner of the property against the party who is answerable for the loss, either in bar of the action or in mitigation of damages.³ The insurers' payment gives them an equitable interest in the claim against the wrong-doer.⁴ But this subrogation of the insurers is subject to the right of the owner to be fully compensated for the loss of his property ;⁵ if he has obtained a partial indemnity from a municipality whose liability is less extensive than that of the insurers, this will be a defence only *pro tanto* to the insurers ; they will still be liable to him within the limits of their policy for the full amount of his loss, after deducting therefrom the net proceeds of his recovery against the municipality.⁶ But if the insured owner of the property, after receiving payment of the insurance, is fully indemnified for his loss by the wrong-doer or from the latter's means, he must then account to the insurers for what they had previously paid him.⁷ On the same principle, where a building which was insured against fire, but not to its full value, had been burned through the fault of a municipality, and the owner had brought an action therefor against the municipality, and undertook to sue for the whole damage, he was held to be entitled to conduct the action without the interference of the insurers, though it was said that he would be liable to the insurers for anything that he might do in violation of his equitable duty towards them.⁸ By the civil law, as adopted in Canada, the subrogation of the insurers is more extensive ;

¹ London Ass. Co. v. Sainsbury, 3 Doug. 245 ; Rockingham Ins. Co. v. Boshier, 39 Maine, 253.

² Mason v. Sainsbury, 3 Doug. 61.

³ Clark v. Blything, 2 Barn. & Cress. 254 ; Perrott v. Shearer, 17 Mich. 48 ; Harding v. Townshend, 43 Vt. 536.

⁴ Pratt v. Radford, 52 Wisc. 114.

⁵ People's Ins. Co. v. Straehle, 2 Cincinnati Sup. Ct. 186 ; Newcomb v. Cincinnati Ins. Co., 22 Ohio St. 382.

⁶ Pentz v. Ætna Ins. Co., 9 Paige (N. Y.), 568.

⁷ Darrell v. Tibbetts, 5 Q. B. Div. 560.

⁸ Commercial Ass. Co. v. Lister, L. R. 9. Ch. 483.

and, though liable for and paying only a part of the damage done, they may require the insured to subrogate them *pro tanto* to his remedy against the wrong-doer who has caused the loss, and may thereupon maintain a suit in their own names for the recovery of their payment from such wrong-doer.¹

§ 233. **Subrogation of Mortgagee to Insurance procured by Mortgagor.** — A mortgagee as such has no claim to the benefit of a policy of insurance procured upon the mortgaged property by and for the mortgagor.² But an agreement, express or implied, on the part of the mortgagor, that he will keep the mortgaged premises during the continuance of the mortgage insured for the protection of the mortgagee, will create an equitable lien upon the money due for a loss on a policy procured by the mortgagor in his own name upon the mortgaged property, whether the policy existed at the time of the mortgage or was afterwards taken out by the mortgagor,³ although, by a clause in the condition of the mortgage, the mortgagee was permitted, upon the mortgagor's default, himself to take out a policy for his protection at the expense of the mortgagor, adding any premiums that he might pay to the mortgage-debt;⁴ and this equitable lien of the mortgagee will avail against both the insurance company and an assignee of the policy, if they were prior to the assignment notified of the rights of the mortgagee.⁵ And if in such a case a suit at law to recover the loss under the policy is pending between the legal owner of the policy and the insurance company, equity will not enjoin the further prosecution of this suit, but will, to avoid delay and

¹ Quebec Ins. Co. v. St. Louis, 7 R. I. 491; Carter v. Rockett, 8 Paige Moore P. C. 286, Parke, B., citing (N. Y.), 437.
Alauzel on Assurance, p. 384, § 477;
Pardessus, *Cours de Droit Commercial*,
595; Quimault, p. 248; Toullier, tit.
IV. § 175; Emerigon (English trans.,
1850), Ch. XII. § 14, pp. 329-336;
Pothier on Assurance, p. 248.

² Columbia Ins. Co. v. Lawrence,
10 Peters, 507; Nichols v. Baxter, 5
U. S. 439.

³ Dunlop v. Avery, 23 Hun
(N. Y.), 509.

⁴ Wheeler v. Factors' Ins. Co., 101
U. S. 439.

⁵ Nichols v. Baxter, 5 R. I. 491;
Thomas v. Vonkapff, 6 Gill & J. (Md.)
372; Vandegraaff v. Medlock, 3 Porter
(Ala.), 389.

expense and ascertain the rights of the parties, allow the suit to proceed to judgment, enjoining, however, the company from making payment to the plaintiff in that suit, and the plaintiff from receiving such payment, and allowing the mortgagee to appear and prosecute the suit, for the protection of his equitable lien upon the loss contested in it.¹ If the mortgagor's covenant was to keep the buildings insured, and in case of loss to apply the insurance-money to rebuilding, and after a loss the mortgagee has sold the land under his mortgage for less than is due upon the mortgage-debt, he will still be entitled to his equitable lien upon the insurance-money for the balance due to him, although he has, by his sale, made rebuilding by the mortgagor or his representatives impossible.²

§ 234. **Where a Creditor obtains Insurance upon Property on which he has a Lien.** — Where a creditor effects insurance upon property mortgaged or pledged to him to secure the payment of his demand, the insurers do not become sureties for the debt, nor do they acquire all the rights of such sureties.³ They are insurers of the particular property only; and so long as the property remains liable for the debt, so long its destruction by fire will be a loss to the creditor within the terms of the policy.⁴ Accordingly, a mortgagee who has, at his own expense, insured his interest in the property mortgaged to him against loss by fire may, in case of such a loss before he has received payment of his demand, collect the amount of the loss from the insurers for his own use, without first assigning the mortgage or any interest therein to the insurers;⁵ nor in such a case can the insurers, upon offering to pay the loss and

¹ *Nichols v. Baxter*, *supra*.

⁴ *Bradley, J.*, in *Insurance Co. v.*

² *Thomas v. Vonkapff*, 6 Gill & J. Stinson, 103 U. S. 25.
(Md.) 372.

³ *Cone v. Niagara Ins. Co.*, 60 N. Y. 619; *Excelsior Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343, 359; *Hadley v. N. H. Ins. Co.*, 55 N. H. 110. But see *Kip v. Mutual Ins. Co.*, 4 Edw. Ch. (N. Y.) 86.

⁵ *King v. State Ins. Co.*, 7 Cush. (Mass.) 1, citing and considering *Roberts v. Traders' Ins. Co.*, 17 Wend. (N. Y.) 631; *Tyler v. Ætna Ins. Co.*, 16 Wend. (N. Y.) 385; *Carpenter v. Providence Ins. Co.*, 16 Peters, 495.

the amount due upon the mortgage above the loss, require the mortgage to be assigned to them, and thus be subrogated to the rights and remedies of the insured under his mortgage.¹ But in New Jersey it is held that the insurers will, in such a case, upon their payment of the loss, be subrogated *pro tanto* to the benefit of the mortgage or other security held by the insured, and by paying to the insured the whole amount of the claim for which the latter holds his securities, they will become entitled to all such securities; and if after effecting the insurance the insured has parted with any of his securities or received partial payment of the debt for which they are held, and which gives him his insurable interest, the liability of the insurers will be proportionally diminished.²

§ 235. **Rights of Mortgagor in Insurance obtained by Mortgagee.** — A mortgagor is not entitled to the benefit of insurance in the mortgaged property obtained by the mortgagee in his own name, at his own expense, and without the privity of the mortgagor, and in the event of a loss cannot require the amount received by the mortgagee upon such insurance to be applied in reduction of the mortgage-debt.³ But if the mortgagee has procured the insurance, though in his own name, at the request and expense and for the benefit of the mortgagor, as well as for his own protection, though this is by a parol agreement unknown to the insurers, the mortgagor will have the right, in case of a loss, to have the avails of the policy applied for his relief towards the discharge of his indebtedness.⁴ So, if the owner of land, after executing articles of

¹ *Suffolk Ins. Co. v. Boyden*, 9 Allen (Mass.), 123.

² *Sussex Ins. Co. v. Woodruff*, 26 N. J. Law (2 Dutch.) 541, criticised in *Ins. Co. v. Stinson*, 103 U. S. 25.

³ *Honore v. Lamar Ins. Co.*, 51 Ills. 409; *Stinchfield v. Milliken*, 71 Maine, 567; *Concord Ins. Co. v. Woodbury*, 45 Maine, 447; *White v. Brown*, 2 Cush. (Mass.) 412; *Cush- ing v. Thompson*, 34 Maine, 96.

⁴ *Hay v. Star Ins. Co.*, 77 N. Y.

235; *Kernochan v. N. Y. Ins. Co.*, 17 N. Y. 428 (affirming S. C. 5 Duer, N. Y. 1); *Norwich Ins. Co. v. Boomer*, 52 Ills. 442; *Concord Ins. Co. v. Woodbury*, 45 Maine, 447; *Honore v. Lamar Ins. Co.*, 51 Ills. 409; *Richardson v. Home Ins. Co.*, 21 Upper Canada (C. P.), 291; *Hazard v. Canada Ins. Co.*, 39 Upper Canada (Q. B.), 419. See *Morrison v. Tenn. Ins. Co.*, 18 Mo. 262.

agreement for its sale, but before making a conveyance, insures the buildings standing upon the land, and not merely the purchase-money agreed to be paid to him, he may upon a loss recover the whole amount of the insurance, and will hold the surplus over the balance of the purchase-money due to him in trust for the vendee of the premises ; and the insurance company will have no right of subrogation to his claim upon the vendee for such purchase-money.¹ Where the owners of real estate, holding insurance against the loss of the buildings by fire, assigned the policy to a mortgagee of the estate, and a loss having occurred, the assignee brought suit upon the policy in the name of the insured, and obtained judgment thereon, and then, instead of collecting this judgment, coerced the payment from the insured by a foreclosure of his mortgage, the insured was held to be entitled to the benefit of this judgment, although, while the assignee held the policy, he had effected other insurance upon the property, without notice to the insurers.²

§ 236. **Insurance obtained by Mortgagor for Benefit of the Mortgagee.** — If the owner of an equity of redemption has procured a policy of insurance upon the buildings standing on the mortgaged premises, payable in case of loss to the mortgagee, as additional security to the latter, it is the right of the former to have the proceeds of the policy, in case of a loss, applied to the payment of the mortgage-debt ;³ nor will this right be affected by the fact that the policy contains a stipulation that no conveyance of the property shall affect the right of the mortgagee to recover for a loss ; but if, after the issuing of such a policy, the equity of redemption is sold and conveyed, and a loss then occurs, and the insurance company, upon paying the amount of this loss to the mortgagee, takes from him an assignment of the mortgage and of the policy, the pur-

¹ *Ins. Co. v. Updegraff*, 21 Penn. St. 513.

³ *Graves v. Hampden Ins. Co.*, 10 Allen (Mass.), 281.

² *Roberts v. Traders' Ins. Co.*, 17 Wend. (N. Y.) 631.

chaser of the equity of redemption may redeem from the mortgage by paying to the insurance company as assignee of the mortgage the amount remaining due upon the mortgage-debt after deducting therefrom the payment received by the mortgagee from the company.¹ And an action at law upon a policy insuring the mortgagor, but made payable in case of loss to the mortgagee, and remaining in force for the protection of both, may be maintained in the name of either of them,² though it has been intimated that the consent of the mortgagee is necessary to the maintenance of an action upon such a policy by the mortgagor in his own name.³ So long as the mortgagee is unsatisfied, he has the right to keep the control of such an action, and to receive the avails thereof.⁴

§ 237. **Where the Policy stipulates for the Subrogation of the Insurers.** — A policy of insurance taken out by the mortgagor or the owner of the equity of redemption, and made payable in case of loss to the mortgagee, which, besides a stipulation that a forfeiture as to the mortgagor shall not affect the right of the mortgagee to recover for a loss, contains also the provision that, in case of the payment to the mortgagee of a loss for which the insurers would not be liable to the mortgagor, the insurers shall be subrogated to the rights of the mortgagee and entitled to an assignment of the mortgage, is not available to the mortgagor, after a forfeiture

¹ *Graves v. Hampden Ins. Co.*, *supra*.

² *Marten v. Franklin Ins. Co.*, 38 N. J. Law (9 Vroom), 140; *State Ins. Co. v. Maackens*, 38 N. J. Law, 564. See *Ennis v. Harmony Ins. Co.*, 3 Bosw. (N. Y.) 516; *Flynn v. North Amer. Ins. Co.*, 115 Mass. 449.

³ *Jackson v. Farmers' Ins. Co.*, 5 Gray (Mass.), 52; *Turner v. Quincy Ins. Co.*, 109 Mass. 568.

⁴ *Ripley v. Astor Ins. Co.*, 17 How. Pr. (N. Y.) 444; *Cone v. Niagara Ins. Co.*, 60 N. Y. 619; *Frink v. Hampden Ins. Co.*, 45 Barb. N. Y. 384;

Hammel v. Queen's Ins. Co., 50 Wis. 240; *Hartford Ins. Co. v. Olcott*, 97 Ills. 439; *Hadley v. N. H. Ins. Co.*, 55 N. H. 110; *Chamberlain v. N. H. Ins. Co.*, 55 N. H. 249; *Motley v. Manufacturers' Ins. Co.*, 29 Maine, 337; *Brown v. Roger Williams Ins. Co.*, 5 R. I. 394; *National Ins. Co. v. Crane*, 16 Md. 260; *Price v. Phoenix Ins. Co.*, 17 Minn. 497; *Fletcher, J.*, in *Barrett v. Union Ins. Co.*, 7 Cush. (Mass.) 175, 181, cited approvingly in *Phillips v. Merrimack Ins. Co.*, 10 Cush. (Mass.) 353.

of his right under the policy; and, upon the payment of such a loss by the insurers to the mortgagee, they may take an assignment of the mortgage, and enforce payment from the mortgagor of the whole amount of the debt secured thereby.¹ The same rule will be applied to a policy of insurance procured by a mortgagor and made payable in case of loss to a mortgagee, which has become forfeited by its terms, but which has been kept alive as to the mortgagee by an agreement between him and the insurers that his interest shall be absolutely insured, and that the insurers may be subrogated to his rights upon their payment to him of a loss, if the policy become avoided as to the mortgagor.² This stipulation for the benefit of the mortgagee, though contained in a policy issued to the mortgagor, is an independent agreement between the insurers and the mortgagee, with which the mortgagor has no concern.³ And if the mortgagee has himself insured his interest as such by a policy providing that upon the payment to him of a loss he shall assign his mortgage to the insurers, they will, upon paying to him the amount of a loss and taking an assignment of his mortgage, be entitled to all his original rights under the mortgage, for the whole of the debt secured thereby.⁴

§ 238. **Between Lessor and Lessee with option to Purchase.**

— If the lessee of buildings has by the terms of his lease the option to purchase them, and they are insured for the benefit of the lessor, the lessee cannot, after the buildings have been burned, and the lessor has received the amount of his insurance, require, by then exercising his option to purchase, the insurance-money to be applied towards the satisfaction of his purchase-money and the arrears of his rent.⁵ But if the

¹ *Springfield Ins. Co. v. Allen*, 43 *Firemen's Ins. Co.*, 8 *Daly* (N. Y.), N. Y. 389. 421.

² *Ulster Savings Institution v. Leake*, 73 N. Y. 161. See *Foster v. Thornton v. Enterprise Ins. Co.*, 71 *Equitable Ins. Co.*, 2 *Gray* (Mass.), Penn. St. 234. 216.

⁵ *Gilbert v. Port*, 28 *Ohio St.* 276.

³ *Phoenix Ins. Co. v. Floyd*, 19 *Hun* (N. Y.), 287. See *Graham v. See Poole v. Adams*, 12 *W. R.* 683.

insurance was procured by the lessee in accordance with his agreement, and for his benefit after exercising his option to purchase, he will, upon the exercise of this option after the occurrence of a loss, be entitled to the benefit of such insurance.¹ This subject was considered in a recent case, in which it appeared that a lessee had by the terms of his lease the option of purchasing the leased premises for a stipulated price by giving notice before a fixed time of his intention to do so. The lessor covenanted to insure, and did insure. The buildings were burned down; and the lessor received the insurance-money. The lessee then gave seasonable notice of his intention to purchase, and claimed the benefit of the insurance-money as part payment of the stipulated price; but, the lease containing no provision as to the disposition of the insurance-money, it was held that the lessee was not entitled to it.² The tenant has no interest in insurance procured for the benefit of the landlord,³ just as the landlord has no equitable claim upon the tenant's insurance of his own interest,⁴ and just as vendor and vendee have respectively no equitable claim upon insurance procured by either upon his own interest,⁵ unless by agreement between them.⁶

§ 239. **Subrogation of Life Insurers.** — The doctrine of subrogation has no application to a contract of life insurance.⁷ Accordingly, where a railroad company has by its negligence caused the death of a passenger upon its road, insurers who have thereby been compelled to pay a policy of insurance issued

¹ *Reynard v. Arnold*, L. R. 10 Ch. 386.

² *Edwards v. West*, 7 Ch. Div. 858, criticising *Lawes v. Bennett*, 1 Cox, 167, and explaining *Reynard v. Arnold*, *supra*.

³ *Darrell v. Tibbetts*, 5 Q. B. Div. 560; *Leeds v. Chatham*, 1 Sim. 146; *Miltenberger v. Beecroft*, 9 Penn. St. 198; *Tongue v. Nutwell*, 31 Md. 302; *Ely v. Ely*, 80 Ills. 532.

⁴ *Merchants' Ins. Co. v. Mazange*, 22 Ala. 168; *Ely v. Ely*, 80 Ills. 532.

⁵ *King v. Preston*, 11 La. Ann. 95; *Hammer v. Johnson*, 44 Ills. 192; *Wood v. Northwestern Ins. Co.*, 46 N. Y. 421; *Rayner v. Preston*, 14 Ch. Div. 297.

⁶ *Benjamin v. Saratoga Ins. Co.*, 17 N. Y. 415.

⁷ But see the general language in *Ætna Ins. Co. v. Hannibal & St. Joseph R. R. Co.*, 3 Dillon C. C. 1; *Harding v. Townshend*, 43 Vt. 536.

by them upon his life cannot maintain an action against the railroad company for the reimbursement of such payment ; for though the loss of the insurers was caused by the railroad company's wrongful acts, yet, as these wrongful acts affected the insurers only by reason of their artificial contractual relation with the insured, to whom the wrong was done, their loss is too remote and indirect a consequence of the wrong to be the foundation of an action.¹ Nor can the railroad company set up the insurance in diminution of the damages for which it is liable.² And payment by a life insurance company to a creditor of the amount of an insurance policy issued by it to him upon the life of his debtor, is not *pro tanto* a satisfaction of the debt,³ unless the premiums have been paid by or for the debtor.⁴ If the debtor pays off the indebtedness in his lifetime, he cannot require from the creditor an assignment of such a policy,⁵ unless it was really obtained for him or at his expense.⁶

¹ Conn. Ins. Co. v. N. Y. & N. H. R. R. Co., 25 Conn. 265 ; *postea*, § 244. 595, overruling S. C. 20 L. T. (N. S.) 1002 ; Morland v. Isaac, 20 Beav. 388 ; Coon v. Swan, 30 Vt. 6. And see Mobile Ins. Co. v. Brame, 95 U. S. 754.

² Kellogg v. N. Y. Central R. R. Co., 79 N. Y. 72. ⁵ Gotlieb v. Cranch, 4 De G., M. & G. 440 ; Knox v. Turner, L. R. 9 Eq. 155.

³ Humphrey v. Arabin, 2 Lloyd & Gould, Ir. Ch. Plunkett, 318. ⁶ Courtenay v. Wright, 2 Giff. 337 ; Drysdale v. Piggott, 8 De G., M. & G. 546.

⁴ Bruce v. Garden, 22 L. T. (N. S.) 546.

CHAPTER VIII.

SUBROGATION OF STRANGERS.

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§ 240. **Strangers or Volunteers not entitled to Subrogation.**—

The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, without being under any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his own.¹ “The doctrine of subrogation,” said Mr. Chancellor Johnson,² “is a pure unmixed equity, having its foundation in the principles of natural justice, and from its very nature could never have been intended for the relief of those who were in a condition in which they were at liberty to elect whether they would or would not be bound; and, so far as I have been able to learn its history, it has never been so applied. If one with a perfect knowledge of the facts will

¹ Webster's Appeal, 86 Penn. St. 409; Hoover v. Epler, 52 Penn. St. 522; Sanford v. McLean, 3 Paige (N. Y.), 117; Griffin v. Orman, 9 Fla.

22; Shinn v. Budd, 14 N. J. Eq. 234.

² Gadsden v. Brown, Speers Eq. (So. Car.) 37, 41.

part with his money, or bind himself by his contract in a sufficient consideration, any rule of law which would restore him his money or absolve him from his contract would subvert the rules of social order. It has been directed in its application exclusively to the relief of those that were already bound, who could not but choose to abide the penalty. Sureties, for example, who have before become bound, are among the special subjects of its care.¹ . . . Another example of the application of the same principle will be found in the case where two creditors have mortgages or other liens upon the same property of the same debtor. Thus, if the subsequent creditor pay the prior debt, he is entitled to be substituted to the rights of the prior creditor, as a means, without injury to the prior creditor, of enabling him to secure payment of his own debt.² But I have seen no case, and none has been referred to in the argument, in which a stranger, who was in a condition to make terms for himself, and demand any security he might require, has been protected by the principle."

§ 241. **The Voluntary Payment of a Debt by a Stranger extinguishes it.** — Subrogation by operation of law exists in favor, not of all who pay the debt of another, but only in favor of those who, being bound for it, have therefore discharged it.³ The demand of a creditor which is paid with the money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished by the payment.⁴ It is a well-settled general rule that no one can be allowed to obtrude himself upon another as his surety; and therefore if a man voluntarily pays the debt of another, without any agreement to that effect with the debtor, he cannot take the place of the

¹ *Antea*, § 86 *et seq.*

² *Antea*, § 12 *et seq.*

³ *Nolte v. Creditors*, 19 Mart. (7 Mart. N. S.), La. 602; *Harrison v. Bisland*, 5 Rob. (La.) 204; *Hough v. Ætæna Ins. Co.* 57 Ills. 318; *Boyd v. McDonough*, 39 How. Pr. (N. Y.)

389; *Kuhn v. North*, 10 Serg. & R. (Penn.) 399; *United States Bank v. Winston*, 2 Brock. C. C. 252; *Guy v. Du Uprey*, 16 Calif. 195.

⁴ *Shinn v. Budd*, 14 N. J. Eq. 234; *Woods v. Gilson*, 17 Ills. 218; *Kitchell v. Mudgett*, 37 Mich. 82.

creditor or recover the money so paid of the debtor, because the law does not permit one man thus officiously and without solicitation to intermeddle with the affairs of another.¹ A drayman, having contracted to haul and deliver to a vessel certain cotton, hauled it to the vessel and deposited it on the levee, at a place pointed out to him by the officers of the vessel, and left it there at their request, they declining to receipt for it on the ground that it was too late in the day. The cotton having been stolen in the night, the drayman paid its value to its owners, and brought his action against the vessel, to recover the amount of this payment. But it was held that he could not recover; for the cotton had been delivered to the vessel; the vessel was liable to the owners of the cotton; and the payment by the drayman, being one which he was not bound to make, did not subrogate him to the right of those owners against the vessel.²

§ 242. **Application of this Principle to the Case of one who binds himself for a Pre-existing Debt.** — The owner of an equity of redemption which was subject to several mortgages gave his notes with an indorser to the holder of the first mortgage for the interest which was due thereon. The indorser paid these notes at their maturity; but no assignment of the mortgage was made to him. On a subsequent sale of the property, he claimed to be subrogated to the rights of the first mortgagee to the amount of the notes which he had thus paid, and so to have a preference over the subsequent mortgagees in the surplus proceeds of the sale after the payment of the first mortgage. But it was held that, as he was not a party to the original transaction, and there was nothing in the mortgage which provided for making him a surety, so that he might be subrogated to the rights of the mortgagee, he was merely a volunteer, and accordingly was not entitled to the priority which he claimed. He could only entitle himself to the

¹ *Bland, Ch.*, in *Winder v. Dufferer*, 2 Bland Ch. (Md.) 199, citing *Stokes v. Lewis*, 1 T. R. 20.

² *Roth v. Harkson*, 13 La. Ann.

benefit of the security held by the creditor by an agreement to that effect, or by taking an assignment of a corresponding interest in the mortgage when he paid the note.¹ The same principle has been declared in South Carolina.²

§ 243. **Application of this Principle to the Case of one who loans Money to the Debtor for the Payment of his Debt.** — The mere loaning of money to a judgment-debtor to be applied by him in part satisfaction of a judgment which was a lien upon his real estate does not subrogate the lender in whole or in part to this lien, even though it was understood between the parties to the transaction that it would have this effect.³ The lender of money which is applied by the borrower in part payment of the purchase-money of land is not thereby subrogated to the vendor's lien upon the land.⁴ One who pays off a prior incumbrance upon property in which he has himself no interest to be protected will not by his payment be subrogated to the lien which he has discharged, as against those having intervening interests in the property,⁵ even though, after the incumbrance had been really discharged by his payment of the debt; but not formally released, he took an assignment thereof, without the consent of the owner of the property.⁶ But if, when he made his payment, he manifested an intention to keep the prior lien alive for his protection, as by taking a quitclaim deed from the prior incumbrancer, his payment will be deemed to have been made, not in extinguishment, but as a purchase, of the charge, and he may hold under it.⁷

§ 244. **Creditor not substituted to Remedy of his Debtor against a Wrong-doer.** — One who has been injured by the act of a wrong-doer has no right, in consequence thereof, to be

¹ *Swan v. Patterson*, 7 Md. 164.

Woods v. Gilson, 17 Ills. 218; *Wil-*

² *Gadsden v. Brown*, Speers Eq. (So. Car.) 37.

son v. Soper, 44 Maine, 118; *Wolff v. Walter*, 56 Mo. 292.

³ *Unger v. Leiter*, 32 Ohio St. 210.

⁶ *Moody v. Moody*, 68 Maine, 155.

⁴ *Griffin v. Proctor*, 14 Bush (Ky.), 571.

⁷ *Freeman v. McGaw*, 15 Pick. (Mass.) 82; *Cole v. Edgerley*, 48

⁵ *Downer v. Wilson*, 33 Vt. 1; *Maine*, 108.

subrogated to the benefit of an indemnity which the wrong-doer may have taken against the consequences of his wrongful act;¹ nor, though his debtor may by reason of the wrong have become unable to pay him,² or he may have been put to expense about the person to whom the wrong has been done,³ will he therefor be substituted to the remedy of such person against the wrong-doer. A judgment-creditor can maintain no action against one who has converted to his own use the goods of the debtor, though the latter had no other property, and the creditor is thus prevented from obtaining the satisfaction of his demand,⁴ unless he has before the conversion acquired a legal interest in the property by means of a levy of his execution thereon;⁵ and then he sues in his own right, and not by substitution to the remedy of his debtor. The same principle applies to an action by a carrier against his servant for damages done by the latter to goods in his possession, for which the carrier has satisfied the owner of the goods.⁶

§ 245. **When the Person making Payment of the Debt of another regarded as a Stranger or Volunteer.** — It is sometimes difficult to ascertain when the payment of a debt will be considered to have been made by a mere stranger or volunteer. A payment made by one who was liable to be compelled to make it will not be regarded as made by a stranger, and will not extinguish the indebtedness of the party on whom rests the ultimate liability.⁷ So, where a guardian has been compelled to pay to his ward a sum of money due from a former guardian, on account of his having neglected to compel the payment thereof by the former guardian, he is by his payment subrogated to the right of the ward, and may recover the amount from the

¹ *McGay v. Keilback*, 14 Abbott Pr. (N. Y.) 142.

² *Green v. Kimble*, 6 Blackf. (Ind.) 552.

³ *Anthony v. Slaid*, 11 Metc. (Mass.) 290.

⁴ *Green v. Kimble*, 6 Blackf. (Ind.) 552.

⁵ *Yates v. Joyce*, 11 Johns. (N. Y.) 136.

⁶ See *Smith v. Foran*, 43 Conn. 244.

⁷ *Heritage v. Paine*, 2 Ch. Div. 594; *Farmers' Bank v. Erie R. R. Co.*, 72 N. Y. 188; *Jacques v. Fackney*, 64 Ills. 87.

former guardian or the sureties upon the latter's bond.¹ Said *Thompson, C. J.*,² "The principles of subrogation do not apply in favor of volunteers. They can obtain the right of substitution only by contract. The cases which I have referred to above³ illustrate who are not to be regarded as volunteers and strangers. One was the case of an indorser, who was substituted to the judgment-creditor whose judgment the proceeds of his note had paid. His indorsement was voluntary. Another paid for his own protection an execution on a prior judgment. He was not legally compelled to pay. A third and fourth advanced money, one in favor of an estate, and one to his ward. They were all subrogated, and not regarded as strangers. I regard the doctrine as applicable in all cases where a payment has been made under a legitimate and fair effort to protect the ascertained interests of the party paying, and where intervening rights are not thereby jeopardized or defeated. Such payments, whatever their effect might be at law in extinguishing the indebtedness to which they apply, will not be so regarded in equity, if contrary to equity to regard them so."

§ 246. **Instances of the Subrogation of a Person on his paying the Debt of another.** — A groom who has paid a farrier's bill for shoeing a horse under his charge will not be regarded as a volunteer, but will, after he has fully satisfied the farrier, be subrogated for his reimbursement to the farrier's lien upon the horse.⁴ The clerk of a steamboat who has advanced the money for the payment of the wages of the crew on an order drawn by the captain upon the owners of the boat will be substituted to the rights of the crew as their equitable assignee;⁵ but it

¹ *Smith v. Alexander*, 4 Sneed Vt. 212; *Wallace's Appeal*, 5 Penn. St. (Tenn.), 482. 103; *Kelchner v. Forney*, 29 Penn.

² *Mosier's Appeal*, 56 Penn. St. 76. St. 47; *Greiner's Estate*, 2 Watts

³ *Cheeseborough v. Millard*, 1 (Penn.), 414

Johns. Ch. (N. Y.) 409; *Cottrell's Appeal*, 23 Penn. St. 294; *Silver* 522.

Lake Bank v. North, 4 *Johns. Ch. (N. Y.)* 370; *Payne v. Hathaway*, 3 *Hoover v. Epler*, 52 Penn. St. 522. ⁵ *Abbott v. Baltimore Steam Packet Co.*, 4 Md. Ch. Dec. 310.

would be otherwise if the money had been advanced by one not connected in any manner with the boat.¹ A county, having paid to the State the amount of a State tax for which its treasurer was in default, may be subrogated to the remedy of the State against the sureties upon the treasurer's official bond; for, while the ultimate liability was upon the treasurer, the payment was for the relief of the county, and so could not be deemed to have been voluntarily made.² So, where the general agent of an insurance company had appointed a local agent and taken from him a bond running to the company, and conditioned that the local agent should pay over to the company all moneys received by him, and the general agent had paid to the company certain premiums received by the local agent but not accounted for by him, it was held, in a suit upon this bond brought in the name of the company for the benefit of the general agent, that since the latter had the appointment of the local agents, and was bound, not only by contract with the company, but in order to keep his own position, to pay over all moneys received by his subordinates, his settlement with the company for the local agent's defalcation did not discharge the bond, but he was entitled to be subrogated to the rights of the company against the sureties upon the bond.³ Where one, believing that he was a surety upon an administrator's bond, settled with the next of kin, who entertained the same belief, it was held, the discovery having been made that he was not such surety, and the administrator having become insolvent, that, having made the settlement and paid his money under a mistake of fact, he was not to be deemed an officious intermeddler, but must be regarded in equity as at least a purchaser for value of the claims of the next of kin against the administrator and the real sureties, and that he had an equity to be subrogated to the rights of the next of kin under the adminis-

¹ *Steamboat White v. Levy*, 10 Ark. (5 English) 411.

² *Elder v. Commonwealth*, 55 Penn. St. 485.

³ *Hough v. Aetna Ins. Co.*, 57 Ill. 318.

tration-bond.¹ And the general proposition has been laid down that one whose money has discharged claims against a trust estate, which it was bound to pay, though he cannot maintain an action at law against the trust estate or the *cestui que trust*, will be subrogated in equity to the rights of the holders of such claims ;² but this must doubtless be limited to the case of one who has an interest in making the payment on which he rests his claim.³

§ 247. **Subrogation of one paying a Debt at the Instance of the Debtor.**—One who pays a debt at the instance of the debtor, under such circumstances that it appears to have been contemplated by the parties that he should become entitled to the benefit of the security for the debt held by the creditor from the debtor, may, as against the debtor, be subrogated to the benefit of such security and of the debt which he has discharged.⁴ And a party who has paid a debt at the request of the debtor, and under circumstances which would operate a fraud upon him if the debtor were afterwards allowed to insist that the security for the debt was discharged by his payment, may also be subrogated to the security, as against that debtor.⁵ But this subrogation will not be allowed against one interested in the property held as such security, who was a stranger to the transaction by which the payment was made, and who was under no obligation for the payment of the debt,⁶ unless it appears that the payment was made, not as an extinguishment of the debt, but in reliance upon, and as a purchase of, the security.⁷ This is a species of conventional subrogation, being a subrogation by an implied convention or agreement.

§ 248. **Conventional Subrogation.**—It has been said that

¹ *Capehart v. Mhoon*, 5 Jones Eq. 277; *Caudle v. Murphy*, 89 Ills. (Nor. Car.) 178. 352.

² *Hines v. Potts*, 56 Miss. 346.

⁵ *Lockwood v. Marsh*, 3 Nevada,

³ *Antea*, § 12.

138.

⁴ *Wilson v. Brown*, 13 N. J. Eq.

⁶ *Wolff v. Walter*, 56 Mo. 292.

⁷ *Caudle v. Murphy*, 89 Ills. 352.

whenever a payment is made by a stranger to a creditor in the expectation of being substituted to the place of the creditor, he is entitled to such substitution.¹ But the doctrine generally adopted is that a conventional subrogation can result only from a direct agreement to that effect made with either the creditor or the debtor, and that it is not sufficient that a person paying the debt of another should do so merely with the understanding on his part that he is to be subrogated to the rights of the creditor,² though, if the agreement has been made, a formal assignment will not be necessary.³ And the agreement may be shown by subsequent acts which indicate a prior agreement. Thus, where a stranger pays the amount of an execution which has been put into the hands of a sheriff, a subsequent assignment of the judgment by the plaintiff therein to the person making the payment will be regarded as showing that the payment was made in purchase, and not in discharge of the judgment.⁴ And no claim by subrogation, whether conventional or by operation of law, to the securities held or the remedies enjoyed by a creditor for the collection of his demand, can be enforced, until the whole demand of the creditor has been satisfied.⁵ Until then there can be no interference with the creditor's rights or securities which might, even by a bare possibility, prejudice or in any way embarrass him in the collection of the residue of his demand.⁶ Subject to these limitations, any agreement, whether made by the debtor or the creditor, for the substitution of the person advancing money for the payment of a debt to the securities, remedies, or priorities of the creditor, will, to the extent of the agreement, be enforced in equity.⁷

¹ *Tradesmen's Building Association v. Thompson*, 32 N. J. Eq. 133; *Coe v. New Jersey Midland R. R. Co.*, 27 N. J. Eq. 110.

² *New Jersey Midland R. R. Co. v. Wortendyke*, 27 N. J. Eq. 658, reversing in part *Coe v. New Jersey Midland R. R. Co.*, *supra*.

³ *Neely v. Jones*, 16 W. Va. 625.

⁴ *Carter v. Halifax*, 1 Hawks (Nor. Car.), 483.

⁵ *Antea*, §§ 70, 118, 127.

⁶ *New Jersey Midland R. R. Co. v. Wortendyke*, 27 N. J. Eq. 658.

⁷ *Grant, in re*, U. S. Dist. Court,

§ 249. **Conventional Subrogation upon Payment of a Debt, and a Remedy for the Payment itself, cannot coexist.** — One who claims under an assignment of a debt and of the securities which were held for its payment, or under a conventional subrogation to the rights of the creditor, which is equivalent to such an assignment,¹ cannot also claim the benefit of the payment which he has made for such assignment or conventional subrogation as a distinct ground of relief against the debtor. He cannot, at the same time that he takes the benefit of the securities, claim also the advantages of having extinguished them by his payment. This principle was confirmed in England, in a case in which it appeared that property was conveyed to trustees, to raise £75,000, with which to pay off prior mortgages, which, with arrears of interest, amounted to that sum. The trustees did not raise the money, but allowed a third party to pay off the mortgages and to take transfers of them, and then made a deed, purporting to assign to him the charge of £75,000, and to mortgage the property to him for that sum. But it was held that he could not charge interest on that sum, but that his right to stand as mortgagee was limited to the principal and interest due upon the mortgages that had been thus transferred to him.²

§ 250. **Conventional Subrogation in Louisiana.** — In Louisiana conventional subrogation to the rights and securities of a creditor in favor of a third person paying the debt can take place only by an express agreement to that effect entered into by the creditor³ at the time of the payment.⁴ Accordingly, in that State, one who advances money to a debtor for the purpose of paying an indebtedness secured by a mortgage, under an agreement with the debtor that he shall, for his security,

Mass., 14 Am. Law Rev. 801; Mitchell v. Butt, 45 Ga. 162; Fuller v. Hollis, 57 Ala. 435; McMillan v. Gordon, 4 Ala. 716; Owen v. Cook, 3 Tenn. Ch. 78.

¹ *Antea*, § 5.

² Thompson v. Hudson, L. R. 2 Ch. 255, affirming S. C. L. R. 2 Eq. 612

³ Hoyle v. Cazabat, 25 La. Ann. 438

⁴ Brice v. Watkins, 30 La. Ann. 21.

be subrogated to the benefit of the mortgage, will nevertheless have no such right of subrogation, unless the creditor was also a party to the agreement.¹ Nor will facts going to show the intention of the parties that the person making the payment should be subrogated to the benefit of the securities held by the creditor be sufficient to effect this substitution, unless this intention appears to have been actually executed by a conventional subrogation.² But since a conventional subrogation invests the person in whose favor it is made with all the rights and privileges of the creditor as fully as an assignment would do, one who has paid a judgment to the plaintiff therein, and has been expressly subrogated to his rights, may take out an execution thereon to his own use; for such an express subrogation is a sufficient authority to use the creditor's name for the recovery of the debt from the judgment-debtor.³

¹ *Hoyle v. Cazabat*, 25 La. Ann. 438.

² *Harrison v. Bisland*, 5 Rob. (La.), 204.

³ *King v. Dwight*, 3 Rob. (La.) 2.

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